No. 2631

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY (a corporation),

Appellant,

vs.

THE GLOBE NAVIGATION COMPANY (a corporation), and S. P. WESTON, as trustee in bankruptcy of the GLOBE NAVIGATION COMPANY (a corporation), bankrupt,

Appellees.

REPLY BRIEF FOR APPELLANT.

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FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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In this reply, we shall briefly point out the many misstatements of fact in which appellees have indulged, and the manifest errors into which they have been led, touching the matters essential to a determination of the question of liability under the policies. It is worthy of note that they attempt no serious explanation of the admitted errors with which the District Court's opinion is so pregnant.

I.

THE "NOTTINGHAM'S" UNSEAWORTHINESS.

THE "NOTTINGHAM" WAS UNSEAWORTHY.

Despite the ease with which appellees would gloss over the unseaworthy condition of the "Nottingham," the fact remains, as shown by the undisputed testimony of the master, that, *on leaving port, she was found to have fifteen inches of water in her;* that *on the second day it took the crew one hour out of every four to free her from water* (Ap. 261-2, 300-1); *that on putting her upon her starboard tack, she made more water rapidly, and in a short time it was impossible for the hand pumps to keep her free* (Ap. 303). On finding that he could not handle the increase of water with the hand pumps, although the men worked for four hours (Ap. 264-5), the master ordered the mate to start the steam pump, "and something happened to be wrong with the steam pump" (Ap. 265, 306). The steam pump was finally gotten into working order, sometime before they struck the heavy gale on the 8th (Ap. 268-9, 309). The vessel, however, had not been freed of water (Ap. 307-310).

No ingenuity of argument can alter the fact that prior to the gale of October 8th, *the "Nottingham" was in a badly leaking condition;* that, indeed, she had half filled with water; that her hand pumps could not free her of water, and her steam pump was out of working order. At the time she was struck by the gale, she was still not free from water. If that condition of hull was not unseaworthiness, then the test of seaworthiness will require revamping! *Such, on the ad-*

mission of the vessel's master, was her condition during the first six days of her voyage from October 2nd to October 8th.

Now, if the conditions of weather encountered during that period were not such as to account for the unseaworthiness, then it follows, as night the day, that such unseaworthiness must have existed on sailing. What was the weather experienced? *The character of weather to be expected on a voyage off the coast!* So stated the master (Ap. 306). It is thus established to a demonstration that the "Nottingham" was not in fit condition reasonably to meet the perils to be "expected" on the voyage.

By every test, therefore, she was unseaworthy.

Appellees cannot gainsay the established facts.

The Unseaworthiness Was Not Caused by the Westport Grounding.

Appreciating the presumption of unseaworthiness which undeniably exists, and that no adequate cause therefor can be pointed to subsequent to the vessel's departure from Astoria, it is contended that her unseaworthiness was caused by her taking the mud at the mouth of Westport slough on her way down the river to Astoria. This suggestion of appellees, and their highly colored description of their now alleged strain (brief p. 25) finds no evidentiary support in the record, *but, on the contrary, the testimony of appellees' principal witnesses is contradictory of it.* It appears from the "secretive" telegram sent the master by appellee

on December 21, 1911, that *Walker,* appellees' surveyor, thought *that the top sides were responsible for the leak, although he later testified that the only way that he could account for the "Nottingham" having gotten water into her, was "through the hatches"* (Ap. 355-6). Similarly with the master. Upon receipt of the telegram directing careful search, he claims to have examined the vessel thoroughly all over, *but the only leak,* save for a few soft places under the counter, *found was that in the seam along the stern post* (Ap. 317-9).

It thus clearly appears that the contention of the unseaworthiness having been caused by the grounding in Westport Slough is not sustained by any evidence (Ap. 443-6). Such attempted explanation of the cause of the unseaworthiness, *while admitting the unseaworthiness,* is without probative value as to the cause.

The Steam Pump Was Unseaworthy.

It is also naively contended that the fact of the steam pump not being in workable condition did not constitute unseaworthiness because, it is suggested, the "vessel was equipped with the usual hand pumps, which were sufficient to handle the water ordinarily taken in by the vessel in such storms as she usually encountered on her voyages." But her hand pumps were not adequate to take care of the water which she took in notwithstanding that, at the time the steam pump was needed, she had encountered no weather except such as was to be expected off the coast on the voyage. It is no answer to say that an unworkable steam pump did not render her unseaworthy because her hand pumps ought to

have been of sufficient capacity to do that which they failed to do. The steam pump was aboard the ship for a purpose; it was connected with the holds so as to remove any water which might gain access thereto; *it failed in its very purpose at the very moment when it was needed,* and thus left the vessel in a partially water-logged condition when the heavier storm of the 8th was encountered. Who can say that if the "Nottingham" had been freed of water, as she should have been, she would not have safely weathered the gale of the 8th and 9th? Certainly she was not in perfect condition in her partially water-logged state when the storm broke, and that unseaworthy condition was directly attributable not only to whatever cause admitted the water to the vessel, but to the failure of her pumps at the moment when they were put to the test.

With equal equanimity, it is said by appellees that the steam pump was in perfect condition. Such assertion is based alone upon the statement that when tried on the overboard suction the pump worked. But *the purpose for which the pump proved unseaworthy* was not in pumping water from the sea to wash down the ship, but *to free the vessel's bilges of water.* Yet, the master frankly admitted that *not only was the steam pump not tried on the bilges* either for Captain Crowe, when he surveyed the vessel before loading, or at all for Mr. Cherry (Lloyds' Agent, not surveyor), *but had not been used on the bilges, subsequent to the preceding voyage to Callao,* since when the "Nottingham" had been to Astoria, thence to Australia and back to Astoria.

Despite all that appellees may say, *such a record not only establishes that the pump was unseaworthy when needed, but shows a most lamentable want of due diligence in seeing that the pump was in proper condition for its designed use.* The bilge suction was as much a part of the pump as the plunger, and required even more careful attention, because it is admitted that it was liable to become clogged from debris which might find its way to the bilges (brief p. 28). Yet for many, many months it went untried. As was to be expected, it failed when put to the test! Who can but believe that if it had been in proper condition, the "Nottingham" would have weathered the storm? Certainly the record contains no evidence of the gale being so severe that any other vessel suffered by it. There is no hint that the schooner "David Evans", which was in the vicinity, even lost a rope yarn.

Appellees make no attempt to distinguish the application of *Benner Line v. Pendleton,* 217 Fed. 497, a case of unseaworthy pumps. The plain fact is that the "Nottingham" was unseaworthy as to her steam pump.

Was The "Nottingham" Unstaunch?

It is suggested that the unseaworthiness of the "Nottingham" is disproved by the testimony of the master as to the admission of the water through the quick work on the alleged shifting of the cargo. In the first place, not only does this not account for the constantly increasing leakage prior to the putting of the "Nottingham" upon the starboard tack, but even if true, it would, in itself, show an unseaworthy condition of the

vessel. It is not to be denied that a sailing vessel is required to sail upon different tacks. This necessitates the taking of a list, a condition which sailing vessels are built to withstand. Yet, here comes the master, long after making a report of the disaster silent upon the subject, and states that upon putting the "Nottingham" upon the starboard tack she lurched so that "the deckload shifted the least bit" (Ap. 262), and that subsequently he found water "pouring" into her half deck through the break of the poop, and that the galley forward was afloat with water coming in somewhere, through the shifting of the deckload (Ap. 263). No mention was made of this in his report to his owner explanatory of the disaster, nor is it consistent with subsequent developments.

In the first place, had such a shifting of cargo and opening of seams occurred, why would there have been all the "wonderment" as to the cause of the water entering? Appellee on December 21, 1911, telegraphed the master:

> "Walker disagrees with Captain Crowe views about leak. *He thinks topsides responsible.* Wants you to make thorough examination of topsides look especially for rooms make no mention of what you learn over there. Please make examination Friday. Bring equipment list with you" (Ap. 317). (Italics ours.)

The master made the examination and the only seam he found in a leaky condition was the one along the stern post, and a few soft spots under the counter (Ap. 317-9). Walker, on the other hand, even as long after the disaster as September 3, 1913, testified that *the only*

way that he could account for the water getting in the ship was through the hatches (Ap. 355). Such evidence is not compatible with the statement of the master that the cause of the water entering the vessel was the opening of seams through the shifting of the deck cargo. If that had been the cause, is it unreasonable to believe that the telegram of December 21st would have been sent, or that Walker would have testified as he did, or that the master would have stated that no leaks were found, save those above mentioned? Such inconsistencies do not accord with the usual course of human conduct.

In the second place, if the cargo shifted under the stated conditions, and the side of the vessel was thereby sprung so as to admit the water, it demonstrated beyond the need of further proof the positive unseaworthiness of the vessel. The weather was such as to be expected on the voyage; the change in tack was part of the usual navigation of the sailing vessel. *If, then, the side sprung, manifestly it was not sufficiently strong or fastened to withstand the ordinary strains of the voyage.* That being true, the "Nottingham" was unseaworthy in that regard.

Presumption of Unseaworthiness Not Overcome.

The presumption of unseaworthiness arising from the "Nottingham's" springing aleak in weather reasonably to be expected (cases cited in opening brief, p. 12) has not been overcome by any showing of adequate cause, disconnected from the unseaworthiness and arising subsequent to the commencement of the voyage, for the

cause of the leakage apparently was the open condition of the stern post seam and the broken water-closet flange, both of which, for all the evidence discloses to the contrary, existed on sailing. Certainly, even the master found the open stern post seam during his examination following the telegram of December 21 (Ap. 317).

The unseaworthiness of the steam pump is clear: that of the hull, due to unstaunchness, is manifest, if it were a fact that the listing of the vessel and a slight shifting of deck cargo sprung her side, and thereby opened her seams. The refusal of Walker, appellees' surveyor, to accept this explanation of the entrance of water into the vessel (Ap. 355), justifies a skepticism as to the master's afterthought. But if it were true, then unseaworthiness is established.

The Surveys

It is true that Captain Crowe issued a certificate of seaworthiness prior to her loading, but he did not thereafter survey the "Nottingham." It may be that Mr. Cherry examined her at Astoria, but Mr. Cherry was not the agent of appellant, and was not, as appellees state, Lloyds' surveyor. As the record shows, he was Lloyds' agent at Astoria, an entirely different capacity than that of surveyor. But, whatever may have been his opinion as to the vessel, it cannot estop appellant from questioning the manifest unseaworthiness.

The Alleged Waiver of Unseaworthiness

It is said by appellees that they were induced and instigated to incur the general average expenses set forth in the general average statement prepared by their adjusters, John & Higgins (brief pp. 13, 14, 18). Such assertion is not true. Nor is there evidence to support it. The record, on the contrary shows that appellant denied liability for total loss from the beginning, and has never to this day receded from that position. The general average expenditures were made by appellees of their own volition in caring for ship and cargo, many of them being incurred in removing the vessel to the St. Johns' drydock for the express purpose of determining whether or not there was a loss under the policies (Ap. 370-1). True, it was done without prejudice to the rights of either party, but it is not in consonance with the facts to say that the expenditures were "instigated" or "induced" by appellant. They were not, and appellees have not been misled as now claimed.

It is said that the defense of unseaworthiness has been waived by delay, and yet appellant gave notice during the trial that the defense would be made if the evidence adduced merited it (Ap. 394-5). Following the taking of proof, unseaworthiness was pleaded in conformity with the evidence, and no objection to appellant's right to do so was interposed by appellees.

If, therefore, the evidence establishes unseaworthiness, or fails to overcome the presumption thereof, as we have shown that it does, the policies were voided.

Pope et al. v. Swiss Lloyd Ins. Co., 4 Fed. 153 (Judge Hoffman).

It is suggested that rescission required a return of premium. That would be true where the premium had not been earned, but here the premium had been earned by the attachment of the time policies on the 20th day of April, 1911. The fact that the policies were subsequently voided by breach of warranty did not make any part of the premium returnable. Being one entire premium for a specified term, it was fully earned once the risk commenced.

Arnould on Marine Ins., 8th Ed., Sec. 1251.

It is also contended that *Victoria S. S. Co. v. Western Assur. Co.,* 139 Pac. 807, establishes a rule by which a breach of warranty will not be held to void a policy unless there is an express rescission. Such construction not only goes beyond the plain meaning of the opinion, —for the case had alone to do with an immaterial warranty,—but is contrary to the express holding of this court.

In

Canton Ins. Office Ltd. v. Independent Trans. Co., 217 Fed. 216,

this court, construing a policy substantially in the form of the policies in suit (San Francisco Hull Time Policies), held that a breach of warranty voided the policy. Express rescission was not required. To the same effect was Judge Hoffman's decision in

Pope et al. v. Swiss etc., supra.

We respectfully submit, therefore, that the evidence clearly establishes that the "Nottingham" was unseaworthy and that the policies were thereby voided.

II.

CONSTRUCTION OF POLICY.

CLAUSE 9, NOT CLAUSE 3, DEFINES RIGHT OF ABANDONMENT.

It is contended by appellees that the words "and the provisions of the Civil Code of California," as used in the following clause of the policies:

> "Touching the adventures and perils which this Insurance Company is contented to bear, and takes upon itself in this Policy, they are of the Seas, Fires, Pirates, Assailing Thieves, Jettisons, Barratry of the Mariners (but not of the Master) * * * *and all other losses and misfortunes that shall come to the hurt or damage of the vessel hereby insured, or any part thereof, to which insurers are liable* by the Rules and Customs of Insurance in San Francisco, including the Rules for Adjustment of losses printed on back hereof and *the provisions of the Civil Code of California,* excepting such losses and misfortunes as are excluded by this Policy" (italics ours),

have the effect of imposing upon appellant a liability for constructive total loss, as such liability is fixed by the provisions of the Civil Code of California, to wit, sections 2705 and 2717. Such construction of the clause assumes, in the first place, that notwithstanding no mention is made in the clause of the degree of loss intended to be covered, i. e., whether actual or constructive total loss, such was its intent, despite the fact that the words are but limitations upon the preceding words "and all other losses and misfortunes that shall come to the hurt or damage of the vessel, or any part thereof", which follow the preceding specific enumeration of various causes of loss, as seas, fires, pirates, etc. In other words, after naming specifically the adventures

and perils which appellant was contented to bear, and take upon itself, as of the seas, fires, pirates, etc., the clause contained the general provision "and all other losses and misfortunes, etc." Now, the word *other* referred back, on the *ejusdem generis* principle, to the preceding character of losses and misfortunes so as to indicate that those which were to follow were of similar category to those just enumerated. When, then, it is said that the words "and the provisions of the Civil Code of California", modifying or defining the other losses and misfortunes that should come to the hurt or damage of the vessel insured, or any part thereof, were not used in the sense of adding to the kinds of losses previously enumerated, but referred to a degree of loss, irrespective of kind or cause, such interpretation does violation to every principle of construction. On appellees' theory, but for such clause, the policies would not have covered a constructive total loss, and yet it is elementary that every policy of insurance so insures, unless express exception thereof is made. No exception of that character was made in the policies in suit, but they did except partial loss by virtue of a red ink deletion in another clause. And as though no claim had just been made that the liability for constructive total loss was created by clause 3, appellees, on page 32 of their brief, suddenly assert that the first clause expressly covers actual and constructive total loss.

But, in even more marked degree is the construction which appellees would give to the policies unsound, for the certain effect of saying that the words

> "and all other losses and misfortunes that shall come to the hurt or damage of the vessel hereby insured, or any part thereof, to which insurers are liable by * * * the provisions of the Civil Code of California, * * *,"

made appellant liable for a constructive total loss, as it is defined by sections 2705 and 2717, would be to hold that clause 9 of the policies was nullified by the provisions in question. Little wonder, then, that appellees were led to the confession: "It seems to us that there is a conflict between the two" (clauses 3 and 9). The construction which they would place upon clause 3, in the vain endeavor to obtain the advantage of sections 2705 and 2717 of the Civil Code, inevitably drove them to such conclusion. Such conflict would exist because section 2717 provides that a person insured by a contract of marine insurance *may abandon* the thing insured * * * and recover a total loss thereof, when the cause of the loss is a peril insured against:

> 1. "If more than half thereof in value is actually lost, or would have to be expended to recover it from the peril:
> 2. "If it is injured to such an extent as to reduce its value more than one half, etc.,"

whereas clause 9 provides

> "that the insured shall not have the right to abandon the vessel unless the amount which this company would be liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) shall exceed half the amount hereby insured".

Both section 2717 and clause 9 of the policies prescribe the conditions under which abandonment could

be made, but the conditions are so utterly dissimilar, so irreconcilably in conflict, that effect could not be given both. If both were carried into the policies, one would have to fail.

In such circumstances, it surely cannot be seriously contended that, although clause 3 makes no reference to sections 2705 and 2717 of the Civil Code, it impliedly embodies them in the policies, and that thereby clause 9, and, of necessity, clause 8, are to be nullified! If that were the intent of the policies, clause 9 would never have been inserted in the policies. It was placed there to perform a function, not as a dead letter; and the only effect that can be given it is that of prescribing the conditions under which an abandonment for constructive total loss could be made. This court will not read clause 9 out of the policy on such a fallacious contention.

In fact, the whole history of the development of clauses similar to 9, defining the conditions under which abandonment can be made, shows that it was drawn for the express purpose of getting away from the effect of the general American maritime law, of which section 2717 is but a codification (see the history of the clause as recorded in the cases cited on page 37 of appellant's opening brief). To say, then, that while the object of the insertion of clause 9 was to change the rule of abandonment, as prescribed by the general American maritime law, of which section 2717 is a codification, yet the express incorporation of clause 9 in the body of the policies did not accomplish its intended purpose, would, indeed, be an inconsistency.

It is said by appellees on page 36 of their brief that "so far as is shown in the reported cases, none of the cases cited by appellant on page 37 of its brief contained any clause in the policy itself referring to a statute as defining the extent and nature of the liability for the losses covered by the policy". Why, if appellees had but read with a semblance of care the case of

Soelberg v. Western Assur. Co., 119 Fed. 23,

a decision of this court, they would have immediately ascertained not only that the policy there under consideration was identical with those in suit, so far as clauses 3, 8 and 9 were concerned (see pages 26 and 27), but that this court expressly referred to clause 9, and upheld the validity of the policy. Judge Hawley said:

> "In order to entitle the plaintiffs to recover it is essential for them, by competent proof, to show a loss which comes within the terms of their policy of insurance. *They must bring their case within the provisions of the contract of insurance. They are bound by the lawful agreements and stipulations therein contained,* and must satisfactorily prove a loss. The burden is, of course, upon them to establish their right to recover. * * *
>
> "We are of the opinion that these authorities sustain the proposition that *the evidence in this case, which consists of mere proof that the cost of repair would exceed the value of the ship when repaired, does not, under the provisions of the policy, prove* either an actual total loss or a *constructive total loss,* and does not prove a partial loss. * * *
>
> "The policy in the present case provides 'that the insured shall not have the right to abandon the

vessel, unless the amount which this company would be liable to pay under an adjustment, as a partial loss, * * * shall exceed half the amount hereby insured.' * * *

"But it is unnecessary to decide in the present case whether the amount of the insurance of $15,000 in the one case, or $5,000 in the other, or $75,000, the value of the ship mentioned in the policy, constitute the basis of the computation, because no evidence appears in the record to give any basis whatever for the determination of the percentage of damage. *The only evidence in this regard is confined solely to the proposition, heretofore stated, that the vessel when repaired would not be worth the cost of repairs which is, as we have heretofore attempted to show, wholly insufficient.* There must be some testimony upon which a jury could act in fixing the amount of damages. There being none, the court did not err in directing the jury to find a verdict for defendants."

The very fact that appellees have studiously avoided making any reference, save its bare mention once on page 98 of the brief, to the above decision of this court, upon the very form of policy here in suit and decisive of many, if not all, of the determining questions here involved, shows how impossible they have found it to get away from the effect of the decision upon the vital issues. *By their silence upon the case, they confess their inability to distinguish it from the one at bar.* And upon the validity of clause 9 in the policy, it is particularly decisive.

Clause 9, Not Marginal Clause, Defines Right of Abandonment.

The fallacy of the contention that by the use of the word "*including,*" in the marginal clause, general aver-

age and salvage charges were to be added to the cost of labor and materials used in the repairs, instead of being excluded, as provided by clause 9, is self evident even to appellees, because such construction, as we have pointed out in our opening brief, would equally justify and necessitate the adding to the cost of repairs of claims under the three-fourths running down clause. Appellees say that "it is not usual to include those claims in determining constructive total loss." Not usual! Why, we challenged appellees to cite *one* case to this court (opening brief p. 35) in which it had been done! And they have failed to produce the authority. Not usual! *It never has been done so far as any recorded decision shows, or within the knowledge of the most experienced adjusters on the Pacific Coast* (Ap. 489, 498-9, 502). The very suggestion does violence to every basic principle of constructive total loss. Constructive total loss has to do with injury to the insured vessel and the cost of repairing the same; not with injuries inflicted upon other vessels. And yet, if the construction contended for by appellees was given the marginal clause, claims under the three-fourths running down clause could most certainly be added to the costs of repairs, to make a constructive total loss. Such construction is untenable.

Clause 9 has to do with the conditions under which an abandonment for constructive total loss can be made. On the other hand, no reference is made in the marginal clause to the conditions of abandonment: *that clause alone states what the insurance is against.* The right

to abandon, therefore, is, by every reasonable intendment of the policies, determined by clause 9.

It is charged that because the valuation of $45,000 was stated in the policies, it would be a fraud to enforce the provisions of clause 9. There is in the record no evidence of fraud in making the valuation, or in writing the policies. But, on the contrary, such valuation is conclusive between the parties in the adjustment of a total loss.

Section 2736 of the California Civil Code so provides:

> "A valuation on a policy of marine insurance is conclusive between the parties thereto in the adjustment of either a partial or total loss, if the *insured* has some interest at risk, and there is no fraud on *his* part; * * * *But a valuation fraudulent in fact entitles the insurer to rescind the contract.*" (Italics ours.)

The fact that the code makes the valuation conclusive unless there is fraud on the part of the *insured,* and then gives the *insurer* the right to rescind if there be fraud, is not consonant with the suggestion that, in the case at bar, appellant was chargeable with a fraudulent valuation of appellees' own vessel.

This court, in

> *Standard Marine Ins. Co. v. Nome Beach L. & T. Co.,* 133 Fed. 636, 646,

held:

> "The valuation fixed in the policy is conclusive between the parties."
>
> *Arnould on Marine Insurance,* 8th Ed. Sec. 341;
>
> *The Potomac v. Cannon,* 105 U. S. 630; 26 L. Ed. 1194.

With the valuation conclusive between the parties, the fact that it may have been fixed at $45,000 constitutes no valid reason for refusing to enforce the provisions of clause 9. If it does, then the valuation would always be open to inquiry, for, otherwise, it would be impossible to determine whether clause 9 was to be enforced in accordance with its terms.

It is further said in support of the contention that, assuming the "Nottingham" to have been worth $30,000, she could not possibly have sustained a damage of $33,750, and that a constructive total loss under clause 9 was impossible. Of course, there is no proof in the record to support such contention, for it could not be true. And that repairs to a vessel actually worth $30,000 might well cost $33,750, finds recognition in the fact that so long has it been accepted that repairs to an old vessel materially better her and increase her value, that there has grown up in the law of marine insurance the arbitrary deduction of one-third from the cost of repairs to allow for the difference in value arising from the substitution of new material for old. It might well be, then, that repairs to the "Nottingham", valued, because of age and condition, at, say, $30,000, would cost $33,750, and her value when repaired thereby increased, because of the betterments, greatly above the $30,000. For instance, how can it be reasonably urged that the "Nottingham", with her new caulking, new painting, new masts, new rigging, new sails and new equipment would not have been worth more when repaired than before the accident? To say that she would not, would be tantamount to holding that the

vessel could be built anew for her value as decreased by old age,—an absurdity in its very suggestion.

Nor is it correct to say that under all conditions the cost of repairs would have to amount to $33,750 to make a constructive total loss. That would be true if a deduction of one-third was to be made from the cost of all repairs. But if, perchance, damage were done to the ship's bottom immediately after she had been caulked and painted, as might well occur by a heavy grounding, then no deductions would be made from the cost of bottom painting and caulking (clause 8). It would not, therefore, in those circumstances, require a cost of repair of $33,750 to make a constructive total loss under clause 9.

Then, again, while it is true that Thorndyke testified that the vessel was worth only $30,000, that valuation was subject to market fluctuations, depending upon the condition of the freight market. Because, therefore, Thorndyke may have thought her worth $30,000 at the time of the accident, that was no assurance that her value would remain at that figure throughout the term of the policies.

The foregoing but too clearly illustrates the utter fallacy of the contention to which appellees have resorted in their efforts to evade the effects of clause 9 of the policies, fixing the conditions under which an abandonment, as for a constructive total loss, can be made. *The truth is, as appellees well know, that there was nothing fraudulent in the valuation, and that the marginal clause was not inserted to overrule the pro-*

visions of clause 9. That they had no such belief, and did not refuse to accept the policies without the marginal clause, and did not, for that reason, insist upon the marginal clause, as they would hope this court would infer, but which they do not squarely so state (brief pp. 41-2), is proved to a demonstration by their advancement of the different theories of construction by which they have made great effort to annihilate clause 9. If they had accepted the policies on any understanding that the marginal clause provided for a constructive total loss, as known in general marine insurance (as they state on page 42 of their brief), they would not have resorted to the contention that liability for constructive total loss was fixed by the provisions of the California Civil Code (sections 2705 and 2717), through clause 3 of the policies, or to the assertion that the effect of the marginal clause was to cause general average and salvage charges to be added to the cost of repairs, as determined by clauses 9 and 8. The different positions taken are too inconsistent to imprint the stamp of sincerity upon the cry of fraud which they have raised.

The fact is, as we pointed out in our opening brief, that the marginal clause is but definitive in character. Upon no other theory can it be given a construction which balances with the enforcement of all of the other clauses of the policies. So construed, however, it is consistent with body provisions, and should, we most respectfully submit, be enforced accordingly. In so holding, all of the clause of the policy will be made effective. The result is that appellees' right to abandon

is to be determined by the conditions of clauses 9 and 8, and the rules for adjustment on the back of the policies.

Soelberg v. Western Assur. Co., supra.

III.

THERE WAS NOT A CONSTRUCTIVE TOTAL LOSS COMPUTED ACCORDING TO CLAUSES 8 AND 9 OF THE POLICY.

Under this head, we shall reply to part V of appellees' brief.

Appellees open their discussion of the question as to whether the evidence shows a right of abandonment under clause 9 by remarking that Mr. Wilfred Page has made a *sample* adjustment of this loss. It is more than a *sample;* it is an actual adjustment of the cost for which the "Nottingham" could have been fully repaired, and is made, by the admission of appellees' adjuster, Mr. Bishop, strictly in accordance with the principles and rules applicable thereto (see appellant's opening brief pp. 62-69). The result shows that if the "Nottingham" had been fully repaired, the amount which appellant would have been liable to pay under an adjustment as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) would have amounted to $9,540.66.

Appellees contend that the adjustment was incorrect, and would add thereto many items, which, they say, were improperly omitted. Let us examine the extra items, for it will at once be clear that they are not properly to be included.

The first amount which appellees would add is the sum of $3,180, taken from the Hall Bros. estimate (Exhibit "K"). The entire estimate was $5,245, but from it appellees admit deductions amounting to $2,065 should be made, leaving the $3,180. The admitted deductions totalling $2,065 are: $755, for removing wash strake and caulking back of stanchions, the proper cost of which is already included in the Page adjustment; $575, for resalting vessel, instead of which $600 has been included in the Page adjustment; $80, difference in painting allowed by the Walker-Gibbs' agreement; and $655, designated by appellees as certain other deductions contained in the Walker-Gibbs' agreement, the items of which apepllees do not specify. The $655 includes all of the Walker-Gibbs deductions. Now, then, *the pertinent inquiry is, what are the remaining items of the Hall Bros. estimate, totalling $3,180, which appellees would add, and are they properly chargeable to the cost of repair?*

1. The first item is $1,000 for caulking all of main deck and waterways, including space underneath forecastle deck, but not abaft of bulkhead forward end of cabin; on face and sides of bulwarks stanchions; and pitch all seams and butts. Indisputably, that amount cannot be added to the cost of repairs because, in the first place, it includes work already covered by the original specifications, the cost of doing which was included in the Albina bid upon which the Page adjustment is largely based.

If the court will but refer to the original specifications (Exhibit "F", Cornfoot Exhibit 1, Ap. pp. 91, 98), it

will ascertain that they call for caulking of the feet of all bulwark stanchions; decks around hatches, together with one seam on each side of the same for the full length of the vessel; four seams along the waterways on each side for the full length of the vessel, carrying the same under the forecastlehead; alleyways under forcastlehead to be caulked on each side; forecastlehead deck to be searched for leaks, caulked and made tight; 500 feet of caulking on the poop; and all seams to be paved with pitch and puttied. With the Albina bid including the foregoing deck caulking, the $1,000 items of the Hall Bros. estimate cannot be added to the Page adjustment *without thereby charging twice for the deck caulking covered by the specifications.*

In the second place, the $1,000 includes the caulking of *all* of the main deck. The contention that this should have been done is alone based upon the Walker supplemental report, full consideration as to the fairness of which was given in appellant's opening brief pp. 51-5. As we said therein, Walker certainly went over the entire main deck and under the forecastlehead deck before preparing the specifications. In fact, he could not have prepared the specifications without doing so. That he could not have overlooked the deck seams, the caulking of which was not included in the specifications, but included in the supplemental report, is convincingly demonstrated by a single glance at the photograph (Exhibit 2). Walker could not have specified the deck caulking which he did in the original specifications, without having observed the remainder of the deck seams. Having so carefully covered the deck caulking

in the original specifications, and yet not having provided for caulking all of the deck seams, his supplemental report cannot be justified, because if he did not at the time of the preparation of the original specifications note the condition of all of the main deck seams, he could not have known it at the time of making his supplemental report, for, in the interim, he had not been aboard the "Nottingham" (Ap. p. 198). That Walker did not think that the deck needed caulking *all over* at the time he was preparing the specifications is shown by the telegram sent by Thorndyke to the master (Ap. p. 317) in which the master was informed that *Walker thought that the top sides were responsible for the leak.* Thorndyke and Walker manifestly considered, when they sent out the original specifications, that the caulking of the deck seams therein required would make the "Nottingham" seaworthy, for the specifications expressly stated an intent to briefly describe the *work necessary to place the vessel in the same good condition as before the accident.* For that reason, the contractor was to be called upon to observe not only the letter but the spirit of the agreement. Furthermore, that the entire deck did not need caulking was established by the testimony of Mr. Nelson, an independent surveyor employed by the Port of Portland, who testified that *the decks were very good,* all except probably a little loose along the waterways (Ap. p. 444).

On no ground, therefore, can the addition of the item of $1,000 to the cost of repairs included in the Page adjustment, be justified.

2. The second item of the Hall Bros. estimate is $2,020, for caulking the entire hull from keel to bulwarks; caulking bulwarks, abreast of forecastle and poop decks, including painting and cementing of seams as necessary. Appellees insist that this amount should be included in the cost of repairs, and yet during the course of the trial, they **stipulated that the bottom of the vessel, from the third seam below the light load line down, did not require caulking, except as provided in the original specifications** (Ap. pp. 348-9). Manifestly, appellees err when they insist that the cost thereof, as estimated by Hall Bros., should be included. Why they so demand in face of the *stipulation* passes understanding, for the same error was made in their brief below, and was there specifically called to their attention. *The stipulation eliminates the cost of bottom caulking from further consideration.*

This leaves the caulking of the topsides, for they include all portions above the light load line. The aforesaid stipulation as to bottom caulking was without prejudice to the question of the topsides. *The evidence clearly shows that the topsides did not need caulking other than that provided for by the original specifications,* as follows: "Garboard seams on both sides, hood ends of planking and all butts of bottom and topsides to be thoroughly caulked, seams painted and cemented. Before ship is again placed in water, entire planking of hull to be searched for leaks with hose on inside" (Exhibit F, Ap. p. 102). Mr. Mackintosh testified that if a leak developed in the hull, the caulking of it would have been done by him under the bid (Ap. p. 86).

Furthermore, the original specifications covered the repair to the outside of the forecastlehead and poop, as follows:

> "The quick work on the port side to be refastened. * * * Forecastlehead deck to be searched for leaks, caulked where necessary and made tight, including quick work and superstructure on each side. * * * Overhang of poop to be renewed right across * * * Three strakes of quick work and covering board on port side of poop to be renewed back to original scarphs. The whole to be caulked and made tight" (Exhibit "F", Ap. pp. 95, 98, 99).

This work covered that of the topsides included in the second item of the Hall Bros. estimate. Did appellees so state to the court when asking for the addition of the $2020 as part of the $3180? No! Yet it cannot be denied that it is a duplication of work on the topsides. Why, then, if this court is to have this case fairly presented for its determination was not the duplication called to its attention?

Not only was the work called for by the second item of the Hall Bros. estimate thus covered by the specifications and the stipulation, but the record shows that there were no leaks in the topsides, except the hood ends, and only a few soft spots under the counter. *This appears from the master's statements.* Acting on the aforementioned telegram of December 21st, the master, with his mate, examined the vessel thoroughly all over, swinging stages on both sides, and examining particularly the butts and seams of the whole topsides. The only seam found in a leaky condition was that along the stern post, and a few soft spots under the counter. Except for

these, the seams were in as good condition as when the vessel went to sea. The master could see no difference (Ap. pp. 317-9). Mr. Nelson also found the outside caulking to be in very good condition (Ap. p. 444). The caulking of the hood ends was covered by the original specifications, as follows:

> "Hull repairs * * * hood ends of planking and all butts of bottom and topsides to be thoroughly caulked, seams painted and cemented" (Exhibit "F", Ap. p. 102).

In these circumstances, we submit that all of the work required to be done to place the bottom and topsides in sound condition (Hall Bros. item 2) was included in the original specifications. That the work required was not extensive, is shown by the *stipulation* that the bottom caulking was not necessary, and by the testimony of the master as to the topsides. There was not, then, any justification for Walker stating in his supplemental report "calk entire hull up to bulwarks, cement and paint seams as before" (Exhibit "J"). Bearing in mind that Walker had not inspected the "Nottingham" since his survey in December, it was not surprising that counsel *stipulated* that at least a large part of this requirement, advanced for the first time in March, was unnecessary. Being unnecessary as counsel admitted, why did Walker include it in his supplemental report, if he were really making up a specification of *work required to repair damages resulting from the accident?* It is inexplainable.

In this connection it is interesting to note that on March 27th, no mention of this work was made in the

Gibbs-Walker agreement. There is, then, no excuse or reason for appellees now asking this court to add the $2020 of the Hall Bros. estimate to the Page adjustment.

3. The third item of the Hall Bros. estimate, which appellees would seemingly add, is $540, for removing shoe the entire length, installing new shoe, covering bottom of keel with felt and composition sheathing, and fastening shoe with composition spikes (Exhibit "K"). This was also included in Walker's supplemental report, as repairs which were considered as absolutely necessary (Exhibit "J"). But, again, *appellees stipulated that it was not necessary to remove any portion of the shoe, except that provided in the original specifications* (Ap. p. 349). Again, being mindful that Walker did not provide for the removal of the entire keel in his original specifications, but without thereafter seeing the vessel, included such requirement in his supplemental survey *as absolutely necessary,* and that subsequently counsel *stipulated* that repairs needed were as stated in the specifications, and not in the supplemental report, the record, at the least, casts a "shadow of doubt" upon the "reliability" of Walker's supplemental report. One thing is certain, and that is that *the stipulation eliminates any right to have that item of the Hall Bros. estimate added to the Page adjustment.*

4. The fourth item of the Hall Bros. estimate is $20 for removing, etc., iron in wake of anchors. This was not included in the original specifications, *but comes in through Walker's supplemental report* (Exhibit "J"), and *yet the specifications were drawn to place the vessel in the same condition as before the accident.* If

credence is to be given the expressed intent of the specifications, this item cannot be added to the Page adjustment. But if there be doubt, it should be added.

5. The fifth item of the Hall Bros. estimate is $65, for removing, replacing and recaulking cargo ports. This was required by the Walker supplemental report, but not by the specifications. They are part of the topsides and overhang of the poop, and were covered by the specifications under the heading of repairs thereto. Likewise, they were included in the master's inspection, and were not found to be unsound or leaky. Unless the mere fact of their being in the Walker report, is an all-sufficient reason for their being added to the Page adjustment, which we very much doubt in view of the discredit cast upon it by the circumstance of its making, and particularly by counsel's stipulation as to its most important requirements, the item should be excluded. But again, if there be doubt, it should be added.

6. The sixth item of the Hall Bros. estimate is $755, for removing wash strake. This has been deducted by appellees as part of the $2,065, for the correct amount was $277.50, already included in the Page adjustment.

7. The seventh item of the Hall Bros. estimate is $225, for a new foreyard. This is also called for by the Walker report, although its condition must have been known to Walker when he prepared the original specifications. This is evidenced by the fact that Walker carefully included in the specifications repairs to the masts and booms. No mention of it is made in the Walker-Gibbs' agreement (Exhibit 5a). And note in Walker's report that the damage to the yard was that

it was sprung. In all of these circumstances, it would seem that proper foundation had not been laid to require that it be added to the Page adjustment. But add it, if doubtful.

8. The eighth item of the Hall Bros. estimate is $45, for new battens on foremast, called for by the Walker report. It was not mentioned in the specifications or the Walker-Gibbs agreement (Exhibit 5a). The same reason for disallowance applies as to all of the foregoing items for the first time mentioned in the Walker report.

9. The ninth, and last, item of the Hall Bros. estimate is $575, for salting. This has already been deducted by appellees, as $600 for the same thing has been included in the Page adjustment.

Summarizing the Hall Bros. estimate, it is certain that items 1, 2, 3, 6, and 9 cannot, under any circumstances, be required to be added to the Page adjustment. If doubtful, items 4 for $20, 5 for $65, 7 for $225 and 8 for $45, or a total of $355 shall be added.

Now in addition to the foregoing, appellees insist that because the "Nottingham" was in a foreign port (Portland), her home port being Seattle, they are entitled to include in the cost of repair, the wages, not of the manager, but of an expert marine surveyor. This, notwithstanding the fact that the manager felt fully competent to testify regarding the damages and repairs. But for sake of argument, allow the demand, which appellees fix at $975.

This makes a total of $1330 ($355 and $975=$1330) to be added to the $18,913.65 of the particular average

⅓ off column of the Page adjustment, or total of $20,243.65. From this ⅓, or $6747.88, is to be deducted, leaving $13,495.77. To this is to be added, as has already been done in the adjustment, $1500 for consumable stores, and $201.89, vessel's proportion of bottom painting, making a total of $15,197.66. *Inasmuch as appellees insured but $30,000 on the "Nottingham", valued at $45,000, the amount which appellant would be liable to pay under the adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of repairs) would be 30,000/45,000ths, or ⅔ of the aforesaid $15,197.66, or $10,131.77.* As this would not equal, let alone exceed, half the amount insured by appellant (½×$30,000= $15,000), appellees did not have the right, under clause 9, to abandon as for a constructive total loss. In fact, even allowing for everything that could possibly be claimed under the Walker supplemental report and the Hall Bros. estimate thereon, the Walker-Gibbs' agreement, and the original specifications, the amount which appellant would be liable to pay under an adjustment as of partial loss for labor and materials (exclusive of salvage and general average expenses and the cost of funds) would fall *$4868.23* ($15,000 – $10,131.77 = $4868.23) *below the amount required to make possible an abandonment for constructive total loss.*

Appellees reach a different result, showing that the amount which appellant would be liable to pay under an adjustment as of partial total loss, as $17,170.61 (appellees' brief p. 81). The difference in their calculation and appellant's lies in this: they add (A) $3180

from the Hall Bros. estimate (instead of appellant's $355); (B) $975 for supervision (the same as appellant); (C) $2370.14 for stores, instead of the $1500 for which Mr. Cornfoot offered to furnish them; (D) $5780, being *all of the general average* as stated by their adjusters, Johnson & Higgins, less the salvage of $3,000 paid the Port of Portland; and (E) $1554.78 taken out of the items of the general average statement, which were charged to the owners and not to general average, by Johnson & Higgins. All of these sums added to the Page adjustment, with ⅓ deducted, gave a net total of $25,755.01, of which 30/45ths amounted to the $17,170.61. This is the amount which appellees say appellant would have been liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage and general average *expenses* and the cost of funds). The error of appellees, the inconsistencies and unsoundness of such adjustment are so clear and certain that they are easily exposed.

(A) In further consideration of appellees' proposed additions to the Page adjustment, we will again refer briefly to the Hall Bros. estimate from which appellees insist $3180 should be added. We have already pointed out that none of the items, save as a matter of doubt possibly items 4, 5, 7 and 8, totalling $355 can be added to the Page adjustment. Yet, appellees say that $3180 should be added. (On page 81 of appellees' brief this amount which they say should be added is stated as $3885, whereas on page 78 it is given as $3180.) This is based upon Walker's supplemental report, which they say should be accepted because "Walker's statement that

these repairs were rendered necessary by the disaster and were essential to restore the vessel to a good seaworthy condition, stands absolutely uncontradicted, and establishes that fact in the case" (brief p. 84). That is a daring, as well as rash, statement, for it is out of accord with the facts! That all of the work covered by Walker's supplemental report was not necessary to restore the vessel to a good seaworthy condition, was indisputably established by *counsel's stipulation* that two of the largest specifications, bottom caulking and removal of shoe from keel for full length, were not necessary. The stipulation reads:

> "It is hereby stipulated by and between the proctors for the respective parties hereto, that *the following work was not necessary to restore the schooner 'Nottingham' to the same condition that she was in prior to the disaster* which she met after leaving the port of Astoria on October 20, 1911.
>
> 1. *"It was not necessary to cork the bottom from the third plank below the light load line down,* except as provided in the original specifications. * * *
>
> 2. *"That it was not necessary to remove any portion of the shoe,* except that provided in the original specifications. * * * " (Ap. 348-9.)

The broad and reckless statement of appellees cannot be reconciled with that *stipulation, which eliminated* from the Walker report, and thereby from the Hall Bros. estimate *two of its most important and costly items.*

Again, Walker, himself, admitted that Captain Crowe would not agree with his views, and after the disagreement the telegram of December 21st (Ap. p. 317) was sent asking for a secret survey by the master. As we

have seen, the master said that he thoroughly examined the vessel all over, and the only seam that he found in a leaky condition was the one at the stern post, and a few soft places under the counter (Ap. pp. 317-9). All of the other seams were in practically as good condition as when the vessel sailed (Ap. p. 319). Now, if that was not contradictory of Walker's report that the entire hull needed caulking, the word is meaningless.

Still further contradiction is found in the testimony of Mr. Nelson, a disinterested witness and an experienced shipbuilder, who examined the "Nottingham" for the Port of Portland, and found her deck and outside planking and seams in good condition (Ap. pp. 443-6).

Bearing in mind that the Walker agreement was supplemental of the original specifications drawn by him, it is clear that, with the elimination by *stipulation* of the bottom caulking and removal of shoe, except as provided by the original specifications, with the doubt cast upon his requiring, in March, the entire deck to be caulked, as contrasted with that provided by the specifications, with the remaining deck caulking, topsides and shoe removal duplications of work required by the specifications, and with the specifications expressly stating an "intention" to describe the repairs *necessary to place the vessel in the same condition as before the accident,* no reason exists which would justify the addition of $3180, or $3885, as it may be, from the Hall Bros. estimate, save, perhaps, as to items 4, 5, 7 and 8, totalling $355.

And finally it is urged that, despite the foregoing facts, the Hall Bros. estimate on the work required by

Walker's supplemental report, should be added because Captain Gibbs did not testify that the work thereby required was not needed to restore the vessel to a seaworthy condition. Of course, he did not testify. Why? *He did not see the "Nottingham" until May, 1912, seven months after the disaster.* Even then, he did not see her on drydock. He could not, therefore, have had personal knowledge as to the condition of her deck seams, and side seams, bottom, keel, etc., immediately after the accident. When he saw the vessel in May, the seams had been exposed, uncared for during seven months, and could not have been, and were not in as good condition as in October or November. There was every reason, then, for his not being interrogated upon something of which he had no personal knowledge. But that constitutes no sufficient reason for now saying that his failure to testify justifies the acceptance of the Walker report and the addition of its items, as estimated by Hall Bros., to the Page adjustment. The very suggestion demonstrates the extreme to which appellees are driven to increase the cost of repairs.

(B) The addition of $975 for expenses of supervision has already been fully considered and granted, if there be any doubt as to the propriety of the charge.

(C) Appellees insist that $2370.14, as testified to by Mr. Thorndyke, should be added for cost of stores, instead of the $1500 allowed by Mr. Cornfoot.

The list of stores was attached to the specifications and was therefore covered by the bid of the Albina Engine & Machine Works. Had the repair of the "Nottingham" been let to that bidder, the stores would

have been supplied for the amount estimated by Mr. Cornfoot (Ap. 50-3). There is absolutely no reason, then, for asking the court to take Thorndyke's figures as against Mr. Cornfoot's tender.

(D) The next item which appellees would add to the cost of repairs is the sum of $5780.

If the court will turn to the deposition of Mr. Bishop (Ap. 500-44), and, particularly, to page 519 thereof, and, again, to Bishop, Respondents' Exhibit 4 (general average adjustment prepared by Johnson & Higgins), it will note that the total of the *general average* stated, by the adjusters, on the "Nottingham", arising out of the accident, was the sum of $8789.01. Again, if the court will turn to the adjustment, it will note that $3,000 was paid to the Port of Portland in settlement of the salvage claims. The item of $5,780 has, therefore, been obtained by appellees by deducting the $3000, salvage paid the Port of Portland, from the total of the *general average* as stated in the adjustment. While not asking for the addition of the $3,000 salvage (incorrectly stated by appellees as allowed by the court (brief p. 87), for it was a matter of private settlement without a trial), *because salvage is expressly excluded by clause 9,* yet appellees do request that the $5780 be added to the cost of repairs, *notwithstanding that clause 9 equally excludes general average expenses.* Appellees seek to justify this by the statement that they do not consider these general average expenses. *If they were general average expenses, then admittedly they cannot be added to the cost of repairs under the conditions of clause 9.*

Appellees state that "the fault in appellant's position lies in the assumption that expenses incurred by the shipowner after abandonment and after the vessel reaches a port of refuge which is not a port of repair are strictly general average expenses, because the vessel owner, upon incurring such expenses for the common benefit of vessel and cargo, has a right to recover the cargo's proportion thereof from the cargo owner". Now, if the $5780 were not general average expenses, so as to come within the exclusion of clause 9, on what grounds can their inclusion in a general average adjustment, prepared by the most competent adjusters on the Pacific Coast, appointed by appellees, be justified? The expenses were most certainly general average, for everything included therein was a voluntary expenditure made for the benefit of all interests, ship and cargo. *Appellees employed the leading adjusters in the United States to make up a general average adjustment, and, upon its completion, accepted the same as correct.* But not, however, until after appellees' manager had carefully scrutinized the adjustment and even commented upon some of its entries (Ap. 521-2, Exhibit 3). On the strength of the adjustment, *as a general average adjustment,* appellees collected from appellant $3758.31 (Ap. 519), which was 30,000/45,000ths part of $5637.46 (Ap. 519). The latter sum was the proportion of $8780.01, *general average,* which the vessel was required to pay, on a valuation of *$8500.* The balance of the *general average,* or $3142.55, was collected from the cargo, on a valuation of $4738.24 (Ap. 59; Bishop, Respondents' Exhibit 4).

The aforesaid amount of $3758.31 was collected by Johnson & Higgins, appellees' adjusters, from appellant as **general average** under the provisions of the marginal clause of the policies, specifying a liability for general average (Ap. 523).

By what process of reasoning, moral or legal, it can be urged that the $5780, charged by *appellees' general average adjusters,* and collected from appellant under the policies here in suit, *as general average,* is *not general average within the meaning of clause 9 of the policy,* is beyond our conception! Appellees cannot blow hot and blow cold at the same time. They cannot say that the $5780 *was general average* under one clause of the policy obligating appellant to pay general average, and then assert that it *was not general average* under another clause of the policy making general average deductible from the cost of repair, for the purpose of determining whether or not a constructive total loss existed under the terms and conditions of the policy. If *it was general average* when recognition thereof was favorable to the interests of appellees, *it was equally general average* when adverse thereto.

Appellees admit that the $3,000 salvage paid to the Port of Portland should not be added to the cost of repairs under clause 9, which specifically excludes salvage and general average expenses. The exemption does not, however, say "salvage award paid a salvor," but salvage expenses. Now, the costs of suit, attorneys' fees, marshal's fees, etc., which were charged by the adjusters to general average, the same as the $3000, and which went to make up the total expense on account

of the salvage, were as much a part of the salvage expenses mentioned in clause 9, as the bare sum paid to the Port of Portland. The fact is, that the entire $8780 was properly included by the adjusters under the head of *general average,* because it was for expenditures voluntarily made for the preservation of the vessel and cargo, in a port of refuge, before a separation of interests took place. Being general average, none of the items thereof can be added to the cost of repairs, because of the excluding provisions of clause 9.

The cases of *Wallace v. Insurance Company* and *Seward v. U. S. Insurance Company,* cited by appellees, decide nothing to the contrary. The cases stating the American rule are not in point because the case at bar is not one for the application of that rule. The rights and liabilities of the parties to this action are to be adjudged *by the contract embodied in the policies* here in suit, and not by something else.

Soelberg v. Western Assur. Co., supra.

We respectfully submit, therefore, that no part of the $5780 can be charged to the cost of repairs.

(E) Appellees would also add to the cost of repairs, the sum of *$1549.05 (erroneously stated as $1554.78 and $1554.14), which they say were expenses incurred by the owner "in these rescue operations which were incurred for the benefit of the vessel alone". They attempt to justify the addition of these items by the principle on which they would likewise charge the *general average,*

* This sum is stated in appellees' brief on pages 81, 107 as $1554.78, and on page 90 as $1554.14. Neither is correct for the total of the items of Exhibit A (pp. 105-107) from which the sum is taken is $1549.05 and not $1554.78 as printed.

just considered. The details of the total of the $1549.05 are set forth in Exhibit A of the brief (p. 105). We shall briefly examine them, item by item.

$600. This sum was paid Walker for services rendered appellees in preparation and presentation of *their claim* against appellant (Ap. p. 507). It was not for *labor* and *material* in repairs, on which the right to a constructive total loss must be based, under the provisions of clause 9. If part of it could be so charged, it would only be for the surveys made on December 20th and 21st, and the preparation of the specifications based thereon. The earlier survey has already been charged to general average. Certainly, Walker's services in connection with the preparation of appellees' claim are not chargeable, and, yet, appellees have made no attempt to segregate the charge. The statement in the general average adjustment discloses the general character of the services rendered.

$45.10. This was paid the Port of Portland, $5.10 being for the repairs to the donkey boiler to pump out the vessel, and $40 for handling the sails at Astoria, subsequent to the abandonment. Perhaps the $5.10 should go into cost of repairs, but certainly the handling of the sails *should not,* for that expenditure was to preserve the sails while the dispute over the alleged liability under the policies was pending. It was no part of the cost of repairs, and materials necessary to make the repairs (Ap. 506).

$40.00. This was paid the Port of Portland for berthing the vessel from January 19th to February 8th. If appellees had proceeded with the repair of the

vessel, this charge would not have been incurred, as *it was wharfage paid while appellees were asserting their claims against appellant.* The specifications for repairs included wharfage during repairs, so that if appellees had proceeded to repair on receipt of the bids, this expense would never have been incurred. It was not, therefore, any part of the cost of repairs.

$28.70. We admit, for sake of argument, that perhaps this charge should have been added, as it appears to have been for repair to the donkey boiler, although the cause of the damages is not shown.

$38.00 These two sums were for the expenses of
$107.00 Messrs. Clise and Thorndyke to San Francisco to consult their adjusters, and to attempt to settle with appellant, appellees' alleged claim for a constructive total loss (Ap. 511, 521-2, 562). They had nothing whatever to do with repairing the vessel. Certainly, expenses in attempting to secure a payment of the claim of liability under the policies, were no part of the costs of repairing the vessel, within the contemplation of clause 9.

$23.60. This sum was expended in the interest of the owner, and constituted no part of the cost of repairs. If any of Walker's fees are chargeable, then certainly this is not, for Thorndyke rendered no services toward the repairs (Ap. 511).

$34.20. This sum is not properly chargeable, as the tenders could as well have been received by mail in appellees' office at Seattle as in Portland. No

expenses would have been incurred in the former case. The expenditures were not, therefore, an essential part of the cost of repairs (Ap. 512).

$25.20. This was for moving and drying sails on February 23d. If the vessel had been repaired in due course, this expense would never have been incurred, because she would have been in the repairer's hands long before February 23d. It was an expense resulting purely from appellees' delay in repairing, while it was trying to induce appellant to pay a constructive total loss, for which the latter had promptly denied liability, on October 16th—four months previous.

$11.20. This was for the fare of the master in going to Seattle to consult Walker on March 2d. It could not have had anything to do with what the repairs would have cost, if the repairs had been made on receipt of the bids. What the conference was about is not disclosed by the evidence.

$1.60. This was for hauling the ship on March 8th, and was no part of the cost of repairs. It was purely an expense incidental to the continued laying-up of the vessel. If appellees had repaired on receipt of the bids, it would not have been incurred.

$9.60. This was for moving sails on March 27th, months after the bids for repairs were received, and the repairs could have been effected. It would not have been incurred as part of the costs of repairs.

$58.00. This sum was for the board of the master from February 7th to April 12th, and certainly was no part of the cost of repairs.

$3.00 These were expenses of the master on three
$6.85 trips that could have had no connection with the
$14.70 repairs. They were incurred while appellees were still trying to induce appellant to pay a constructive total loss.

$250. This was for the master's wages from February 15th to April 12th and can, by no pretense, be included as part of the cost of repairs. If the vessel had been repaired on receipt of the tenders in December, the expense would never have been incurred.

$29.34. There is no evidence in the record as to what the telegrams and telephones were for, or to whom sent. Certainly, therefore, they cannot be included as part of the cost of repairs.

$212. This expense was for wharfage incurred from February 15th to May 31st, when "the curtain of mystery' is said to have been drawn as to what became of the "Nottingham". Manifestly, it was for wharfage incurred during the period appellees were still seeking a settlement with appellant. It certainly would never have been incurred if the vessel had been repaired on the happening of the accident, or upon receipt of the tenders. It was not, therefore, in any respect, any part of the cost of repairs. How counsel can so represent it to this court passes our understanding.

$10.96. This was for telegrams sent by the general average adjusters. If they had nothing to do with the general average, they certainly had nothing to do with the cost of repairs, for the adjusters were

in no way concerned with the repairs, but alone with the stating of the general average adjustment.

Of the $1549.05, which appellees would thus add to the Page adjustment, *the following sums had absolutely no possible connection with the cost of repairs,* to wit: $40, $38, $107, $25.20, $11.20, $1.60, $9.60, $58.00, $3.00, $6.85, $250, $14.70, $29.34, $212, $10.96, a total of $817.45. Granting for sake of argument that all of the others were chargeable to the cost of repairs, as manifestly they were not,* then such additional items to be so charged would only amount to $731.60 ($1549.05 – $817.45 = $731.60).

SUMMARY.

Based upon the cost of repairs as established by the tender of the Albina Engine and Machine Works and the Gibbs-Walker agreement, as adjusted by Mr. Wilfred Page (Respondent Page's Exhibit No. 1), in accordance with the condition of the policies, *the amount which appellant would have been liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) would have amounted to $9,540.66,* as follows:

The total of the particular average column, as shown by the adjustment was.....	$18,913.65
From this was deducted ⅓ off, leaving.....	12,609.10

* Take, for instance, the item of Walker's fee, $600. The statement in the adjustment shows that it was for various services which were no part of the cost of repairing the damage to the vessel. Appellees attempt no segregation, but baldly insist that the entire amount be charged to repairs.

To this was added for consumable stores, from which there was no deduction of thirds... 1,500.

There was then added the proportion of the cost of bottom painting chargeable to particular average net..... 201.89

Total of particular average net.....$14,310.99

As appellant insured $30,000 on a value of $45,000, appellant's liability would have been 30,000/45,000 of the particular average or (⅔ of $14,310.99)..... 9,540.66

This was $5,459.34 ($15,000—9,540.66=5,459.34) less than the amount required to give appellees the right to abandon.

Now, grant that every addition should be made to the cost of repairs, which, by reason of any doubt or pretense, should not be omitted, still the amount which appellant would be liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage of general average and the cost of funds) would have fallen far short of one-half the amount insured, as follows:

The total of the particular average ⅓ off column, as shown by the Page adjustment, was $18,913.65

Of the Hall Bros. estimate, based on the Walker supplemental report, add everything that, as we have previously shown, could by any doubt or pretense be even considered as part of the cost of repairs necessary to restore the vessel to her former condition—

Items 4, 5, 7 and 8..... 355.

Supervision Expenses ..... 975.

Also add all of the items of the Johnson & Higgins' general average adjustment, as set forth in Exhibit A, pages 105-7 of appellees' brief, not therein charged to general average, which we have just considered, and which on any doubt whatsoever could have been charged to cost of repair, viz., the sum of.....	731.60
	$20,975.25
Deducting ⅓ off, leaves.....	$13,983.50
To this add for consumable stores.....	1,500.
Also add the proportion of the cost of bottom painting chargeable to particular average net	201.89
Total of particular average net.....	$15,685.39
As appellant insured $30,000 on a value of $45,000, appellant would have been liable to pay 30,000/45,000 or (⅔ x 15,685.39)..	10,456.93

This would have been $4,543.07 ($15,000—$10,456.93= $4,543.07) less than the amount required to give appellees the right to abandon.

Again, assume for sake of argument, that the criticisms and aspersions which appellees make of the Cornfoot tender to furnish the consumable stores, were justified, although they are not, and that Thorndyke was right that the stores, instead of costing $1500 would have cost $2370.14. And resolving all other doubts in appellees' favor, as we have done in the preceding statement, *still the amount which appellant would have been*

liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) would have fallen far below one-half of the amount insured, as follows:

The total of the Particular Average ⅓ off column, as shown by the Page adjustment, was		$18,913.65
Add as above from Hall Bros. estimate, Items 4, 5, 7 and 8	355.	
Supervision expense	975.	
Also add the items of the general average adjustment, not charged therein to general average, which we have just considered	731.60	
Total of Particular Average ⅓ off column would be		$20,975.25
Deducting ⅓ off, leaves		13,983.50
Now, add, instead of $1500 for consumable stores, as above, Thorndyke's estimate of		2,370.14
Also add the proportion of the cost of bottom painting chargeable to particular average		201.89
Total of Particular Average net		$16,555.53
As appellant insured $30,000 on a value of $45,000, appellant would have been liable to pay 30,000/45,000ths, or (⅔ 16,555.53)		11,037.02

This would still have been $3,962.98 (15,000–11,037.02= 3,962.98) less than the amount required to give appellees the right to abandon.

Unless, therefore, the court assumes what, we respectfully submit, is an absolutely untenable position, and adds to the cost of repairs the total amount of the general average, less the bare sum of $3,000 paid the Port of Portland for salvage, and including in the general average so added all of the other salvage expenses, *it is impossible to make a constructive total loss, or anywhere near it, under the conditions of clause 9 of the policies, even though all other items upon which there can be any doubt, are included in the cost of repairs.*

We respectfully submit that in whatever aspect the costs of repairs are considered, appellees did not have the right to abandon as for a constructive total loss under the policy terms.

Appellees go still further and insist that the Albina bid should be disregarded, and those of the other three bidders should be taken, or at least averaged. There is no reason, in justice, why the acceptance of the Albina tender should be refused. As we have pointed out in our opening brief, it was made by experienced ship repairers, constantly engaged in the same business, and was backed up by the required bond of a standard surety company. If appellees had seen fit to have *then* repaired the "Nottingham", such repairs could most certainly have been made for the amount of the tender.

The aspersions which appellees would cast upon the Albina bidders, by the "stab in the back" intimations that the estimates were careless, or made through an "over anxiety to secure the work on the part of some contractor" (brief p. 98), or that "a bidder may be

influenced to make a bid below actual cost in order to provide work for his plant, and be willing to take a loss on the work rather than suffer a greater by permitting his plant to stand idle and his employees to seek employment elsewhere''; or that ''he may also be influenced by a desire to aid underwriters in escaping a claim for a total loss in order to secure their favor and patronage in other work later'' (brief pp. 66-67), are unjustified. Such innuendoes come with ill grace from appellees, who, once before, attempted to discredit the Albina bidders, and were afterwards forced to a confession that they were mistaken (Ap. pp. 376-7, 59-60). It is needless to say that not a word in the record even hints to a carelessly prepared estimate, or to an over anxiety to secure work, or to a bid below cost to provide work for an idle plant, or to an influence to aid an underwriter to escape a loss. Of course, appellees do not come out squarely and say that appellant wielded such influence, because they know that there is not a vestige of truth in their suggestion. They resort to veiled insinuation.

We have called the court's attention to this attitude on the part of appellees because of our inability to pass the innuendo by without a just resentment, and because it shows a desperation of mind about the case that, for the moment, has unbalanced the author of appellees' brief. If not, they would stick to the record.

The Albina bid was not secured by appellant, but by appellees upon specifications prepared by their own surveyor. If it was so far wrong that it should not have been accepted, and the other bidders were right, then appellees could have so easily called those bidders as

witnesses, as did appellants, Mr. Cornfoot and Mr. Mackintosh. But no, they contented themselves with alone offering in evidence the hearsay tenders. We respectfully submit that if the Albina Engine and Machine Works, and Messrs. Cornfoot and Mackintosh, were capable and responsible enough to make similar repairs to vessels of the U. S. Government, they were to repair the "Nottingham" (Ap. pp. 43, 67-8), and that their bid should be accepted in estimating the cost of repairing the "Nottingham".

The statement is made by appellees: "the repairs were never actually made. * * * Not having been repaired, the cost of repairs must be estimated" (brief pp. 92, 94). If by those remarks is only meant that the "Nottingham" was not repaired under any of the tenders or specifications here in question, or by any of these bidders, the statements are true, but that is as far as they are true, or that this court is permitted to go in attributing any meaning to the statements.

Stress is laid upon an alleged risk of towing the "Nottingham" from Astoria to St. Johns. Indeed, appellees go to the extreme of saying: "If she had stranded on any of the river bars, she would probably have broken up, in her weakened state at that time" (brief p. 92). Imagine it! If she had stranded on a *sand bar* in the admittedly smooth waters of the Columbia River, she would *probably* have broken up, in her *weakened* state! Did any witness so testify? *No.* Why, if she had stranded, and the towing vessel, which so carelessly put her aground, could not have pulled her off, all that would have been required to

lighten her, and thereby free her from the stranding, would have been the jettisoning of her lumber cargo, part of which was still on deck.

And as to her then weakened state, certainly her master did not find any evidence of it when he made his examination on the telegram of December 21st (Ap. pp. 317-18). Walker could not have thought her very *weak* when he said that the only way that he could account for the water getting in was through the hatches (Ap. p. 355). Nelson did not consider her in a weakened condition (Ap. p. 444). And even counsel stipulated that the caulking of her bottom and removal of the entire keel, was unnecessary, except as provided in the specifications.

The fact is, that there was no danger attached to her removal from Astoria to St. Johns, except such as was incidental to an ordinary towage on the river. Not only did Captain Gibbs so consider it, but so did Walker (Ap. Walker, 221, 229; Gibbs, 401-2). Walker testified:

> "If the channel is properly followed there is not much danger."

The law presumes that ordinary towage skill would be exercised. No reason appears for not doing so.

Appellees' effort to discredit the bid of the Albina Engine and Machine Works, and to bring in a great peril of towage in the Columbia River, lamentably fails, under the evidence. Despite it all, *the fact remains that,* taken in its aspect most favorable to appellees, and resolving every possible suggestion of doubt in their favor, *a right of abandonment, as for a constructive total loss, did not exist under the policies.*

IV.

THERE WAS NOT AN ACTUAL TOTAL LOSS UNDER THE PROVISIONS OF THE POLICIES.

It is contended that the "Nottingham" was an actual total loss because, it is said, the correct rule of law is that an absolute total loss of the vessel exists if a damage is so great as to destroy all value of the vessel as a vessel, so that it would cost more to put her in a condition for use as a vessel than she would be worth after repairs.

One case is cited to support the rule of law so stated, that of

Insurance Co. v. Fogarty, 19 Wall. 640.

The question of total loss in that case did not arise with respect to a vessel, and, of course, not under the form of policy here in suit. Whatever it may hold, then, as to actual total loss of cargo, is beside the question. But, with all of that, the decision does not announce a principle which supports appellees' contention as to what the rule should be. It was a case of damage to a machine of many parts, knocked down and shipped in eight separate pieces. The court said:

> "The circuit court was right in holding that what was insured was machinery—pieces or parts of a machine, pieces made and shaped to unite at points with other pieces, so as to make a sugar packing machine. If parts of them were *absolutely lost,* and every piece recovered had lost its *adaptability to be used as part of the machine;* had lost it so entirely that it would cost as much to buy a new piece just like it, as to repair or adapt that one to the purpose, then there was a total loss of the machinery. If no piece recovered was of any use,

> or could be applied to any use connected with the machine of which it was a part, without more expense on it than its original cost, then there was no part of the machinery saved, however much of rusty iron may have been taken from the wreck. The court went quite as far in behalf of the defendant as the law justified, when it told the jury that the plaintiff could not recover if any piece or portion of the machinery insured arrived at its destination in a condition so perfect that it could have been used with its corresponding or connecting pieces, had they also arrived in good condition."

The court will note that the test there applied was whether every piece recovered had lost its *adaptability to be used as part of the machine.* In the case at bar, it certainly cannot be urged that the "Nottingham" had lost its *adaptability to be used as a part of a vessel;* it was still a vessel, damaged and in need of repair. The decision does not support any principle by which the "Nottingham" could be held to have been an actual total loss under the policies.

The case of

> *Burt v. Brewers Ins. Co.,* 9 Hun 383, affirmed in 78 N. Y. 400,

establishes the law as to what shall constitute an actual total loss. The court said:

> "When the ship in the course of her voyage, and by the agency of the perils insured against, becomes an absolute wreck, when she has been broken in pieces and dismembered so that her planks and apparel are scattered on the sea, this is a case of absolute total loss on ship, though the whole or greater part of the fragments may reach the shore as wreck. In such case, it is quite clear that the ship, as a ship, is totally destroyed, the ship has

> perished, only the wreck remains. * * * where the liability of the underwriter is expressly restricted to an absolute or actual total loss, there must exist such a state of things as that the subject of insurance is wholly destroyed as that thing, in specie, which was insured, or, at all events, there must be left no *spes recuperandi.*"

The court quoted the following from *Murray v. Hatch,* 6 Mass. 465:

> "Whether the injury sustained, and the expenses of salvage, rendered the voyage of no value, and not worth pursuing, is not a question to be considered where the policy is restricted to the case of a total loss. That case is only proved by showing the destruction of the thing specifically. * * * But if afloat, and if she was capable of being repaired at any expense, it was not a total loss within the meaning and intent of the policy relied on in this case."

This court has squarely passed upon the question under a policy identical in form with those in suit, in a case that remains unrefuted by appellees, save in a single instance, viz.,

Soelberg v. Western Assur. Co., supra.

After a review of the authorities, Judge Hawley, commenting upon the case of

Bullard v. Insurance Co., Fed. Cas. 2122,

said:

> "It will thus be seen that the judge instructed the jury as to the distinctions which existed in different kinds of policies. The entire charge of the court clearly shows that *the fact that when the vessel was repaired it would not be worth the cost of repairs did not prove a total loss within the terms of the policy.* The jury found a verdict for a partial loss only." (Italics ours.)

Continuing, after reference to other cases, Judge Hawley said of the case before him:

> "We are of the opinion that *these authorities sustain the proposition that the evidence in this case, which consists of mere proof that the cost of repair would exceed the value of the ship when repaired, does not, under the provisions of the policy, prove* either *an actual total loss,* or a constructive total loss, and does not prove a partial loss." (Italics ours.)

The contention which appellees have advanced has thus not been sustained by the authorities. Inasmuch as the court was passing upon the form of policy in the instant case, we take it that the decision definitely settles the law in this court against the rule which appellees would invoke.

It is said that the "Nottingham" was so damaged that she was worthless as a vessel, and had no value except for the junk value of her material. This is based upon the testimony of appellees' manager and surveyor. It is also stated that her value was $5,000, and that such value was fixed by the stipulation appearing on page 386 of the Apostles. No stipulation appears on that page, but we take it that appellees refer to the stipulation on page 349, stating:

> "It is further stipulated that on April 15, 1912, proctor for libelant made a give or take offer for the 'Nottingham' of five thousand dollars, said offer being without prejudice to the rights of either party in the pending litigation."

In several instances, appellees speak of that stipulation as having established an open value for the "Not-

tingham'' at the time of abandonment. It shows on its face that it is but a stipulation admitting an offer by libelant's proctor on April 15, 1912, of $5,000 for the vessel. The offer was made nearly six months after the accident, and was in no sense an agreement as to value. The fact that appellees made an offer of purchase and of sale, six months after the loss, did not establish the vessel's value at the time of abandonment, and *most emphatically did not bind appellant to an admission that such was the value.* Nor, as appellees state, did the stipulation constitute or embody an agreement to that effect.

The very fact that the offer was not accepted on April 15, 1912, shows that appellant did not consider $5,000 as the value. Appellees knew that appellant was an insurance company, and not a shipowner. It was not in the business of purchasing or owning vessels. Because it was not in that business, however, it was not willing that appellees should take the vessel with any understanding that it was only of the value of $5,000. Hence, the offer was declined.

Why should not the offer as to value have been declined? Appellees had a general average adjustment made of the losses caused by the accident, and collected from appellant 30/45ths of the general average against the vessel. The total amount of the general average was $8,780.01, of which the vessel paid $5,637.46, and the cargo, $3,142.55. Appellant paid $3,758.31, or 30,000/45,000ths of the $5,637.46. Now, *the proportion charged against the vessel was based on a value for the vessel of $8,500 as she arrived at Astoria.* On that value,

appellees claimed against, and collected from, appellant, through its adjusters. Is it any wonder, then, that appellant would not accept, without prejudice, a value of $5,000 for the vessel? Appellees are thus not in an equitable position to claim a value of $5,000, despite the testimony of Walker and Thorndyke.

It is said that the vessel would not have been worth repaired, more than $24,000 or $25,000, and that such value was established by the uncontradicted testimony of Thorndyke and Walker. It is true that no witness contradicted them in so many words; that was not necessary, for the utter unreliability of their estimates is shown by the facts.

It is a fact recognized by the maritime law, that a vessel benefits by repairs. So certain is this true, that it has become the law to deduct one-third from the cost of all repairs, as a commutation for the difference between new and old. That is to say, the replacing of new material for old, in repairs, so betters the vessel that it has for many years been customary to deduct one-third from the cost of repairs. It is absurd, in the face of this settled principle, for appellees to assert that the vessel repaired would be worth less than before the accident. And any amount of testimony by Walker or Thorndyke would not establish to the contrary.

Now, appellees cannot deny that in April, 1911, the "Nottingham" was worth at least $30,000, for that was the amount of insurance which they took out upon her. It is elementary that one cannot overinsure his property. Yet, appellees are here asking *$30,000* because of

a *total* loss! If, in fact, therefore, the "Nottingham" was not worth $30,000 in April, 1911, *she was over-insured,* and a fraud was perpetrated upon appellant. Appellees are certainly not in the equitable position to deny it. If the "Nottingham", with her value enhanced by repairs (and there is no evidence that it would not have been), would only be worth $30,000, on what theory can a claim for that amount, based on total loss, be justified?

We have Thorndyke's admission that the value of the vessel had enhanced since April, so that, at the time of the loss, she was actually worth more than the $30,000 (Ap. 378).

The "Nottingham" must have been at least eight years old, for she was last caulked in 1907 (Ap. 235), so that four years was allowed to elapse between caulkings. Now, is it reasonable to believe, and can any weight be given to the testimony of any manager or surveyor who so testifies, that under the foregoing conditions, the repaired "Nottingham" would only have been worth $25,000? Let us glance at the specifications, and see the new material that would have gone into her (see Apostles, pp. 91-117): Three new masts, booms and gaffs; new chain plates, new rigging for at least all three masts; new running gear; repairs to hull, caulking and painting of decks and hull; cabin rebuilt and completely refurnished, etc., etc.,—*all betterments.*

The absurdity of any contention that the "Nottingham", worth $30,000 in April, 1911, with value enhancing to October, would only have been worth $25,000,

after being rebuilt and refitted at a cost of nearly $21,000, as the specifications provided, is too plain. The opinions of Walker and Thorndyke on the value were on a par with their testimony on the other points on which they have been so thoroughly discredited.

The truth is, as thus established by the evidence, that the "Nottingham" when repaired would have been worth far more than $30,000. With the repairs, then, costing $20,950, and the vessel's proportion of the salvage and general average, to wit, $5,637.46, the outlay would only have been $26,587.46. And if you add to that the $1,549.05 (Exhibit A, brief pp. 105-7) not charged to general average; and add again the $355 of the Hall Bros. estimate, about which there might be some doubt; and charge the $975 for Walker's supervision, thus resolving every doubt in appellees' favor, still the expenditures would only total $29,466.51—*not only less than $30,000, but certainly far less than what the "Nottingham" would have been worth repaired.*

Appellees have never regarded the vessel as an actual total loss. If they had, they would not have abandoned for constructive total loss by the notice in writing on Monday, October 16th, and have later attempted to prove by Thorndyke a verbal abandonment to Taylor on Saturday afternoon, the 14th, at a time when, it turned out, Taylor was not in town. They would not, in the next place have brought this action on the theory of a constructive total loss. Appellees knew that the "Nottingham" was not an actual total loss. She was still a ship, her hull and foremast and rigging being intact, though damaged. She still had on board a large

part of her cargo. She was libeled by the Port of Portland for $33,000 for salvage, a claim that would not have been made had the officials of that municipal corporation considered her valueless as a vessel. A general average was stated and collected on her, as a vessel, by adjusters appointed by appellees. She was towed to St. Johns to be docked for the express purpose of ascertaining whether the cost of repairs made a constructive total loss under the policies. Tenders were taken upon her as a vessel for the repairs. Look at the photograph, an exhibit, taken of her as she lay at Astoria, and she gives every appearance of a vessel, save the loss of three masts. In the face of that array of facts, *it cannot be said that the "Nottingham" had lost her adaptability to be used as a vessel.* Most certainly she was not an actual total loss.

The result is that not only was there not an actual total loss *under the policies and the law,* as laid down by this court in

Soelberg v. Western Assur. Co., supra,

but under appellees' contention as to the law, the facts do not make an actual total loss.

V.

ABANDONMENT.

The Alleged Verbal Abandonment Was Not Made.

We shall reply under this head note to appellees' argument in part IV of their brief.

It is now claimed that Mr. Thorndyke made a verbal abandonment of the "Nottingham" on Saturday, October 14th, the day before she was towed into port, and two days before the written notice of abandonment. We have already commented upon this testimony of Thorndyke's in our opening brief at pages 42 to 47.

It is, indeed, interesting to note the attempt made by appellees to escape from the effect of Mr. Taylor's diary. It is now suggested by counsel, *not by Thorndyke, for he was not recalled after Taylor's testimony, although abundant opportunity therefor was presented,* that the alleged verbal abandonment was probably made at night to Taylor after nine o'clock, subsequent to the time he reached home from Tacoma. *Did Thorndyke even hint at such a possibility? He did not.*

He testified with great positiveness:

> "* * * *thinking it over in connection with the times the testimony was taken and during those periods, keeping the matter constantly in my mind, why, I am now prepared to state that I called Mr. Taylor up in the afternoon of Saturday, the 14th of October and notified him that I had received a telephone message from Mr. Plummer etc.*" (Ap. p. 552).

And with equal asseveration, he stated on cross-examination:

> "Q. *What time was it, in the afternoon of Saturday, that you telephoned Mr. Taylor?*
>
> A. *I say something about three o'clock; it may have been after.*
>
> Q. *At his office?* A. *Yes, sir.*
>
> Q. *Is Mr. Taylor usually at his office on Saturday afternoons?*

A. *I do not know; he was there that afternoon''* (Ap. pp. 559-560).

Is there any testimony, even a word, that now justifies appellees asserting that this conversation took place with Taylor at his home after nine o'clock at night? Why, a witness could not have been more positive than was Thorndyke, when, with his face aflame, he fixed the time and place with such certainty. He was not then testifying two years after an event, from an unrefreshed memory, as appellees impliedly suggest when they say:

> ''the testimony on this subject was brought out some two years after the event. It is not reasonably to be expected that Mr. Thorndyke would accurately remember the exact hour or place when he conveyed this information. * * * '' (brief p. 47).

Thorndyke had previously sworn to the libel alleging the written notice of abandonment, and had thereafter testified to the written notice of abandonment at the instance of appellees' counsel, and since then, had talked with them about this alleged verbal abandonment. As a preliminary explanation to his statement, he testified:

> ''I had not gone very deep into the case, and had not given it as much thought *as I had reason to give it since then,* and I stated that I thought we exchanged telephones at that time, but since that time, *in thinking the matter over, in my office—thinking it over in connection with the times the testimony was taken and during those periods, keeping the matter constantly in mind,* why, I am now prepared to state that I called Mr. Taylor up in the afternoon of Saturday, the 14th of October, and notified him etc.'' (Ap. p. 552).

That is not the testimony of a witness suffering from a lapse of memory, or a recollection dimmed by time. He made no suggestion of a possible faulty memory, but proceeded to state, with professed accuracy, a conversation in which he would have had the court believe an abandonment was made. If his memory was as defective as counsel now suggest, and perhaps as counsel thought when he chided him for not sticking to the truth (Ap. p. 557), why should this court place any dependence upon his statement as to the alleged verbal abandonment? Taylor's denial thereof stands uncontradicted, and the very wording of the written notice of abandonment given on the 16th, challenges any thought of a verbal abandonment made the day before the written notice was prepared (Ap. p. 558). If the verbal abandonment had been given, the written notice would have been a confirmation thereof,—not an independent notice of abandonment.

We submit that the evidence does not justify even the inference that a verbal notice of abandonment was given.

Thorndyke Without Power to Make Valid Verbal Abandonment.

But even if it had been given, it would not have been good. Not because it would have been verbal, but because the "Nottingham" was an encumbered vessel, mortgaged to the Trust Company of America (Ap. p. 339). Mr. Clise testified that he looked after the interest of the trustee in the property (Nottingham) covered by the policies. And he specifically stated that

the written notice of abandonment (Defendant's Exhibit 16) was given under his direction (Ap. 339, 340). He does not claim that the alleged verbal abandonment was made under his authority, and, indeed, it later appeared that not Mr. Clise, but Mr. Poe, prepared the written notice, and that, in fact, Mr. Clise was in San Francisco at the time (Ap. 560). The alleged verbal abandonment would have been ineffectual, for Thorndyke had no authority to convey the interest of the Trust Company.

Arnould on Marine Ins., 8th ed., p. 1433;
Soelberg v. Western Assur. Co., supra;
Gordon v. Mass. F. & M. Ins. Co., 2 Pick. 249;
Sec. 2724, *Cal. Civ. Code.*

Abandonment Condition Precedent to Claim for Constructive Total Loss. The Victoria Case Holds Nothing to the Contrary.

Appellees next proceed to the contention that a notice of abandonment was not necessary at all to give them the right to claim a constructive total loss, but that their right thereto was determined by the condition of the vessel at the time of her abandonment by the crew. Authority for this astoundingly new doctrine of constructive total loss is said to have been found in

Victoria S. S. Co. v. Western Assur. Co., 167 Cal. 348; 139 Pac. 807,

a decision of the Supreme Court of California, referred to in our opening brief.

Whatever may have been the ruling of the court in that case, *it has no bearing upon the case at bar because*

of the difference in policies. It was said by Judge Hawley in

Soelberg v. Western Assur. Co., supra:

> "Parties must be governed by the terms of the contract which they have entered into, and are not bound by the rules which apply only to other and different kinds of contracts."

Here the policies provide that

> "the insured shall *not* have the right to abandon the vessel unless the amount which this company would be liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) shall exceed half the amount hereby insured."

In the case cited, the right to abandon as for a constructive total loss under the policy on freight was fixed by the provisions of the California Civil Code, and not by any clause bearing any similarity to Clause 9 of the policies in suit. What the court may have said, then, as to constructive total loss under a freight policy, determined by the provisions of the Civil Code, *throws no light upon the rights as to constructive total loss under the present policies.*

Furthermore, the case does not, we respectfully submit, hold what appellees contend for it. They have grossly misstated the facts, and thereby given to the decision a distorted meaning. For instance, as a preliminary explanation to the quotation of the excerpt in which the court spoke of there being no necessity of an *actual* abandonment, appellees stated, on page 49 of their brief:

> "There had been an abandonment of the vessel by her owner, but there had *not* been an abandonment of the freight by the owner of the freight. On this state of facts, the underwriter contended that there could be no recovery, as the policy was free from partial loss and particular average, and there had been *no* abandonment as to freight."

Again, on page 51 of their brief, appellees say:

> "The action was to recover for a constructive total loss of freightage *when there had been no abandonment as to freightage;* consequently the question presented was, can there be a recovery for constructive total loss of freightage *without abandonment?*"

By these statements, the impression sought to be left is that the issue was as to whether there could be a recovery for constructive total loss under the policy on freight, where there had *not* been an abandonment of the freight by the owner thereof, but where there had been an actual abandonment of the vessel. Now, the facts were the very opposite to those stated by appellees, and the issue was an entirely different one, as this court will readily ascertain, if it will but look at the record. The policy was on the freight, *and immediately on receipt of news of the disaster, the assured* (charterer of the vessel) *under the freight policy abandoned the vessel to the insurance company and claimed upon it a total loss.* This abandonment of the freight was alleged in paragraph 6 of the complaint, appearing on page 6 of the record, and was admitted by the answer on page 9 of the record. The vessel itself was *actually* (physically) abandoned by her officers and crew as a total loss, but there is nothing in the entire record to show an abandon-

ment of the vessel as for a *constructive* total loss under a policy of insurance. In truth, there was none, for the total loss was, in fact, actual. There was, then, this situation, that the vessel was an actual total loss, but no abandonment was made for constructive total loss; on the other hand, there was an abandonment for constructive total loss of the freight by the charterer under the freight policy,—the very opposite conditions to those stated by appellees.

If, in these circumstances, the provisions of paragraph 4, section 2717, had been literally enforced, a valid claim for a constructive total loss could not have been made out, because, while there had been an abandonment for constructive total loss under the freight policy, there had been none therefor under a policy on the ship. Yet, that is seemingly the condition to an abandonment for a constructive total loss on freight, stated in paragraph 4, as follows:

> "If the thing insured, being cargo or freightage, the voyage cannot be performed nor another ship procured by the master, within a reasonable time and with reasonable diligence, to forward the cargo, without incurring the like expense or risk. *But freightage cannot in any case be abandoned, unless the ship is also abandoned.*" (Italics ours.)

Furthermore, there could have been no abandonment of the vessel under her hull policy by the insured under the freight policy, because the latter was not the owner of the vessel, but the charterer. Naturally, therefore, he had no insurable interest under any hull insurance that vested in him the power *to abandon the vessel* as for constructive total loss. But, even if he had, the act

of abandonment would have been purposeless, in view of the fact that the vessel was an actual total loss.

The result was that notwithstanding that the loss on the freight was sufficient in amount to make a constructive total loss under section 2717, the right to abandon therefor, under the freight policy, was blocked if the court held that the ship must also be abandoned for a *constructive* total loss. It was in these circumstances that the court said:

> "There was an *actual* total loss and destruction of the ship and an *actual* abandonment thereof. No *constructive* abandonment was necessary as to the ship. Hence, the freightage could be *constructively* abandoned, notwithstanding the provision of section 2717 that 'freightage cannot in any case be abandoned, unless the ship is also abandoned'."

That the court was making a distinction between *actual* abandonment and *constructive* abandonment is, of course, patent from its use of those terms. It pointed out that there was an *actual* abandonment of the ship upon its total loss and destruction. No *constructive* abandonment of the ship in the sense of abandoning for a constructive total loss was then necessary, and, clearly, that it is what the court meant when it said:

> "No *constructive* abandonment was necessary as to the ship."

Because of the *actual* total loss of the vessel, and *actual* abandonment thereof, making a *constructive* abandonment of her unnecessary, the court then stated:

> "Hence, the freightage could be *constructively* abandoned, notwithstanding the provision of sec-

> tion 2717 that 'freightage cannot in any case be abandoned unless the ship is also abandoned'."

Plainly, then, the court was not using the words *actual abandonment* in the sense of an *abandonment as for constructive total loss* when speaking of such an abandonment. It referred to the latter as a *"constructive abandonment."* Hence, when the court stated in the first sentence of the excerpt quoted on page 49 of appellees' brief:

> "It is not necessary under this section (2717) that there should be an *actual* abandonment", (Italics ours),

it did not mean that *notice of abandonment*—constructive abandonment, as the court is pleased to term it—*as for constructive total loss* was unnecessary. It is obvious that the court could not have intended any other meaning than that which we have attributed to it, for there was no question in the case of want of notice of abandonment as for constructive total loss—constructive abandonment—so far as concerned the freight policies because notice of such abandonment had been given as was admitted in the pleadings. If, of course, the fact had been as appellees state (brief p. 49), that the underwriter contended that there could be no recovery as the policy was free from partial loss and particular average, and there had been no abandonment as to freight, the language of the court might have been possible of other interpretation. But *those were not the facts,* and the court was not speaking with reference to any such condition. It was treating of a situation where there had been a partial earning of the freight

money by cargo having gone forward to destination, and where an abandonment—*constructive* abandonment—had been made as for constructive total loss under the freight policy.

That the court did not hold that notice of abandonment as for constructive total loss—constructive abandonment—was unnecessary, under 2705, to a claim for constructive total loss, is shown not only by what we have already pointed out with respect to the decision, but by the court saying:

> "Hence the freightage *could be* constructively abandoned *notwithstanding* the provisions of section 2717, that 'freightage cannot in any case be abandoned unless the ship is also abandoned'."

That an abandonment—constructive abandonment—as for constructive total loss is a condition precedent to a claim therefor, is made conclusively evident by the remaining sections of that article of the Civil Code of which section 2717 is a part.

Section 2718 provides that "an abandonment *must be* neither partial nor conditional". By section 2719, "an abandonment *must be* made within a reasonable time after the information," etc. Why *must be,* if not necessary? Section 2720 provides, *inter alia,* that where the thing insured was so far restored when the abandonment was made that there was then in fact no total loss, the abandonment *becomes ineffectual,* a condition that would be meaningless if an abandonment was unnecessary to a claim for constructive total loss. Section 2721 stipulates as to how abandonment shall be made, and section 2722, the requisites of the notice. By section 2723, it is

provided that an abandonment can be *sustained only upon the cause* specified in the notice thereof. If abandonment were unnecessary, as appellees contend, why the need of sustaining it at all?

The enactment of the foregoing sections as part of the article on abandonment, in which section 2717 appears, shows to a demonstration that an abandonment is necessary to a claim for constructive total loss. To hold that it is not, as appellees assert the Supreme Court of California has now construed the law to be, would render the code provisions just referred to, ineffectual. It would overturn the settled principles of insurance law that abandonment is a condition precedent to a claim for constructive total loss.

Soelberg v. Western Assur. Co., supra;
Standard Marine Ins. Co. v. Nome Beach L. & T. Co., 133 Fed. 636, 643.
Am. & Eng. Ency. of Law, 1st Ed., Vol. 14, p. 395;
26 Cyc., 695;
Parsons on Insurance, Vol. 2, p. 107;
Arnould on Marine Ins., 8th Ed., Sec. 1092;
Phillips on Insurance, Vol. 2, Sec. 1491.

We respectfully submit that appellees have misconstrued entirely the effect of the decision in *Victoria S. S. Co. v. Western Assur. Co.,* supra, and that it is not an authority for the court holding that an abandonment was unnecessary as a condition precedent to a claim for constructive total loss. Appellees' rights, therefore, must be measured as at the time of the written notice of abandonment, to wit, on Monday, the 16th day of October, 1911, at which time the "Nottingham" was

securely at anchor, in her damaged condition, in Astoria harbor.

The case of

Peele et al. v. Merchants Ins. Co., Fed Cas. 10905,

is cited by appellees. The decision, however, is not in point, as the policy there under consideration was entirely different in form. That decision was the one, more than all others, which brought about the change in form of policy, and resulted in the adoption of practically the form here in suit. See cases cited on page 37 of appellants' opening brief, containing a history of the change.

Appellant does not make the concessions appellees would attribute to it in the concluding paragraph on page 53 of their brief. Appellant has not so stated, nor does it in fact. And, particularly, does appellant not concede that abandonment before the wreck had been picked up would have been ineffectual. The provisions of the policies (clause 9) alone prescribe the conditions under which abandonment could be made.

Appellees' rights, if any, to claim for constructive total loss are determinable by the written notice of abandonment given on Monday, October 16th, and by the conditions then existing, and by no other notice or at any other time or under any other conditions.

Abandonment for Constructive Total Loss Not Predicable upon Actual Abandonment of Vessel at Sea, or Possession by Salvors.

It is the contention of appellees that clause 9 of the policies does not mean what it expressly says, viz.:

That the insured *shall not have the right* to abandon except upon the conditions therein stated, but, on the contrary, that the insured *shall have the right* to abandon on conditions other than those specified. The plain reading of clause 9 does not permit the construction proffered by appellees. The clause fixed in unambiguous terms the conditions under which the right of abandonment existed. Had it not been intended to so operate exclusively, it would not have so unequivocally stated. Appellees point to no provision of the policy even tending to detract from the positive conditions of clause 9, but advance their own assertion, without foundation on any clause in the policy to which they can point. Such argument is offered solely by way of inducement to the proposition that, without regard to the damages suffered by the "Nottingham", the right to abandon existed while, and because, the vessel was in the possession of the salvors, who had brought her into port after her actual abandonment by the crew.

Clause 9, of course, has nothing to do with an absolute total loss by pirates, etc., liability for which arises independently of the right to abandon. They are moot questions, not involved in the present case, and merit no discussion.

Coming then to the case before the court, it is suggested that because the "Nottingham" was abandoned at sea by her crew, and was thereafter brought into port by salvors, and subsequently libeled for salvage, a right of abandonment existed independently of the conditions of clause 9. In other words, the contention is that appellees had the right to abandon as for a construc-

tive total loss independently of the conditions of clause 9, while, and because, the vessel was in the hands of the salvors.

No case has been cited by appellees, nor have we, after careful research, been able to find one, in which a court has held that an insured owner has the right to abandon for constructive total loss because the vessel is held by salvors, after having salved her as a derelict. And yet that is the essence of appellees' present contention.

Certainly the case of *Cossman v. West,* 6 Asp. 233 (N. S.), does not so hold. The question there under consideration was whether an absolute total loss resulted from the sale of the barque "L. E. Cann" in a suit for salvage by salvors, who had salved her after her abandonment at sea. The court, distinguishing the case from *Thornely v. Hebson,* 2 B. & Ald. 513, held that an absolute total loss existed, for the owner was not in default in not preventing the sale, as he was not, as in *Thornely v. Hebson,* near enough to have acted. The court said that

> "assuming that the presence of the salvor constituted a constructive total loss, but not an absolute total loss, and that there was still a chance that the vessel might be redeemed and restored, the sale under the decree of the court removed, as Lord Abinger remarked in *Roux v. Salvador* (ubi sup.), all speculation upon that subject, and entitled the plaintiff to treat the case as one of total loss without abandonment".

There had been no abandonment, and hence no ground for a claim of constructive total loss. That question was not in the case, and while the court held that

the judicial sale had created an absolute total loss, *the case does not decide,* as asserted by appellees (brief pp. 59, 65), *that possession by a salvor who had salved a derelict, constitutes a constructive total loss* under the form of policy before that court. The use of the words "assuming that their possession constituted a constructive total loss," upon which appellees bear with pressure, does not make the case a decision by the court that a constructive total loss existed under those conditions. *And particularly is it not a holding that a constructive total loss would then exist under the form of policy here in suit.*

McIver v. Henderson, 4 M. & S. 576,

does not decide the proposition which appellees state for it on page 63 of their brief, but simply holds that the vessel and her cargo had not been so far restored after capture, as to reduce a total loss to an average loss. The court expressly pointed out that no contention was made that there was not sufficient ground for abandonment.

And as for *Thornely v. Hebson,* 2 B. & Ald. 513, the case only holds that even a judicial sale for salvage, did not constitute an absolute total loss, because the owners had not used all the means in their power to prevent the sale.

Peele v. Insurance Co., supra,

is not in point. Not only was the policy radically different from the present policies, but nothing was said in the summary quoted on pages 59-60 of appellees' brief, or any other portion of the opinion, which sup-

ports the contention now advanced. No reference was made to possession by salvors as a ground for abandonment.

It is urged, as a foundation to the contention sought to be built upon the foregoing decisions, that the possession of the vessel was lost because she was abandoned and a derelict. Technically she was not a derelict, because it was manifest that the master only left the ship at the instance of the crew on account of the shortage of provisions and fresh water, and that upon finally leaving her, the master had no intention of giving the vessel up, for immediately that he reached port on the *"David Evans"*, in fact before he got ashore, he reported the position of the "Nottingham" to the tug "Wallula," which immediately rescued her (Ap. pp. 282-4). The master thus clearly indicated a then present intent to repossess himself and his owner of the vessel, by sending the "Wallula" to her assistance. The master retained as much right to possession as did the master of the "William", in *Thornely v. Hebson,* when a volunteer crew from the "Hyder Ali" boarded the "William" and ultimately navigated her to port. In both instances, the intent existed on the part of the master to resume possession upon the salving of the disabled vessel.

Abandonment at sea under the conditions of the present case, then, did not constitute a technical derelict, so as to vest in the salvors an absolute right of possession as against the owner. Right of abandon-

ment is not, therefore, conceded as appellees would have it (brief p. 67).

The Bee, Fed. Cas. 1219.

And still further, it is said that the rights acquired by the salvors were such that the owner could not regain possession of the vessel, except upon giving bond. That is true, but no more so than in any case of physical possession by a salvor, whether the vessel be technically a derelict or not. If that were a test of the right to abandon, then in every case of libel for salvage, it would exist, because, upon attachment, the right of possession is diverted until bond is given. Whatever may be the law of England, in this country, possession could have been immediately obtained by a possessory action in admiralty, wherein an appraisement of the salved vessel could have been had, and the bond fixed for the vessel's delivery, and to protect the claims of the salvors. If, before such possessory action was commenced, the vessel was libeled for salvage, then similar appraisement could have been had under the settled practice of the admiralty courts. It is idle and preposterous, therefore, for appellees to assert (brief pp. 55, 69) that preliminarily the bond would have been fixed in excess of $34,000. Nor would the court, in any probability, have required a bond to the value of the vessel, as the maximum allowed for the salving of a derelict, save in rare instances of great hazard of life and property, and at proportionately great expense, does not exceed a moiety of the salved property.

The fact that the cargo was also libeled for salvage did not affect the case (brief p. 69), because that con-

dition would have existed in any salvage service rendered. If the attachment of the cargo gave the right of abandonment, then such right would exist irrespective either of possession of, or damage to, the vessel. Such a contention, of course, is without merit, and even appellees make no attempt to cite authority to it.

Much is again said of the value of the "Nottingham" in her damaged condition, and of the "danger" of the towage to St. Johns. Both matters have been fully discussed in an earlier portion of this brief.

In point of fact, and of any principle supported by authority, the contention of appellees as to the right of abandonment because of actual abandonment, or possession by the salvors, is not sustained.

But even granting for the decisions cited, all that appellees contend they support, still they do not determine, under the facts of the present case, that a recovery can be had for a constructive total loss because at the time the notice of abandonment was given on Monday, October 16th, the "Nottingham" was in the possession of the salvors.

Appellees have insisted that the Civil Code of California governs the rights and liabilities of the parties, save as they have been modified by the terms and conditions of the policies. *They admit,* therefore, *that their rights of abandonment are to be determined by sections 2722 and 2723 of the code,* because such provisions are unaffected by anything contained in the policies.

Section 2722 provides:

> "*A notice of abandonment* must be explicit, and must *specify the particular cause of the abandonment,* but need state only enough to show that there is probable cause therefor and need not be accompanied with proof of interest or of loss."

Section 2723 provides:

> "*An abandonment can be sustained only upon the cause specified in the notice thereof.*"

And, in

> *Bradlie et al. v. The Maryland Ins. Co.,* 12 Peters 378; 9 L. ed. 1123, 1132,

the Supreme Court said:

> "In considering the first (instruction), it is material to remark that by all the well settled principles of our law, *the state of facts, and not the state of the information* at the time of the abandonment, *constitutes the true criterion by which we are to ascertain whether a total loss has occurred or not,* for which an abandonment can be made." (Italics ours.)

Adjudged by those determining principles, *appellees gave no notice of abandonment on which recovery for constructive total loss can be grounded because of the actual abandonment of the vessel, or her possession by the salvors.* The notice of Monday, October 16th, recited:

> "Seattle, Wash., Oct. 16th, 1911.
>
> Fireman's Fund Insurance Company,
> Colman Bldg.,
> Seattle, Wash.
>
> Dear Sirs:
>
> You are hereby notified that we have just received telegram from the Master of the Schooner 'Wm. Nottingham', of which the following is a copy:

'Confirm Nelson's telegram "Nottingham" filled October eight lost deckload and masts went by the board October ninth. Abandoned vessel October thirteenth latitude north 46.16, longitude west 125.25 fore and after part of vessel gutted lost all fresh water. Do you authorize me to pay crew?'

In consequence of the damages sustained we hereby abandon to you the schr. 'Wm. Nottingham' and claim for a total loss under the policies issued by you and outstanding upon her.

It will give us great pleasure to give you any information that you may require, or any assistance we can render in order to protect you. At present we are not informed as to the particulars.

Yours truly,

THE GLOBE NAVIGATION COMPANY,

GFT/G. Per G. F. Thorndyke."

(Ap. 12-13.)

The court will specially note that *no reference is made to possession by the salvors.* The first paragraph gives notice of the receipt of a telegram from the master. Then follows the telegram in which a former telegram sent out by one Nelson is confirmed, and advice is given that the "Nottingham" filled on October 8th, lost her deck load, and masts went by the board on the ninth; that the vessel was abandoned on October 13th in latitude 46° 16′ north and longitude 125° 25′ west; that the fore and aft parts of the vessel were gutted, and that all fresh water was lost. Inquiry is made as to authority to pay the crew. After thus describing the accident to the vessel, the notice stated that "*in consequence of the damages sustained,* we hereby abandon to you the Schr. Wm. Nottingham, and claim for a total loss under the policies insured by you and outstanding upon her."

The remaining portion of the notice expressed a willingness to assist appellant; to furnish any information required, but stated that at that time they were not informed as to particulars.

By section 2722 of the code, *the notice is required* to be explicit and *to specify the particular cause of the abandonment,* and by section 2723, *the abandonment can only be sustained upon the cause specified in the notice.* The provisions are unmistakably clear in their meaning.

The notice of abandonment given by appellees did not, however, specify possession by the salvors as the cause of abandonment! Indeed, no reference was made in the notice to the "Nottingham" having been picked up by the salvors, or of being in their possession.

Abandonment, then, cannot be sustained upon possession by the salvors as a cause of abandonment. And yet, that is the very contention to which appellees have so strenuously addressed pages 54 to 70 of their brief, for on page 59, they say:

> "We insist that when, by perils insured against, the vessel was reasonably and properly abandoned by the crew and became a derelict and was afterwards picked up and brought into Astoria by the salvors and was in their exclusive possession and control, the owner and master being excluded from any participation therein, the salvors asserting a salvage claim in excess of her value, there was a constructive total loss of the vessel at that time irrespective of the extent of damage she had sustained, and that, inasmuch as the owner gave notice of abandonment at that time, the underwriter is liable under this policy."

The contention thus advanced disregards the plain provisions of section 2723, for appellees assert that appellant is liable for a constructive total loss because the "Nottingham", picked up a derelict, was in the exclusive possession and control of the salvors, who were asserting a salvage claim in excess of the value. *Those causes not having been stated in the notice of abandonment, liability for constructive total loss because thereof cannot be held to have existed, unless this court is to ignore the explicit language in which sections 2722 and 2723 of the code are couched.* Such, of course, will not be done, but without it, appellees' contention fails.

The notice of abandonment gave appellant notice of a telegram received from the master, in which reference was made to the "Nottingham" filling, losing her deck-load and masts, of her being abandoned on October 13th, and of her being gutted fore and aft, and losing all the fresh water. It then stated, "*in consequence of the damages sustained* we hereby abandon to you the Schr. Wm. Nottingham etc." Now, the most that can be said for the notice is that *abandonment was being attempted because of the damages*, and not because of actual abandonment of the vessel at sea. But even if it were given a construction which its plain terms do not justify, and held to include the actual abandonment at sea, the notice was nevertheless ineffective to accomplish an abandonment upon that ground, for on the date the notice was given, the abandoned and derelict, if such it was, condition of the "Nottingham" had ended. She was then safely in Astoria harbor,

having been towed into port on the day before, October the 15th (Ap. p. 285).

The Supreme Court has held, in the excerpt which we have just quoted from *Bradlie v. Ins. Co.,* supra, that *the state of facts, and not the state of the information at the time of abandonment, constitutes the true criterion by which we are to ascertain whether a total loss has occurred or not, for which an abandonment can be made.* Tried by that test, the notice of abandonment was ineffectual to constitute a valid abandonment on the 16th because of the abandonment of the vessel at sea, and her then derelict condition, for she had ceased to be abandoned and derelict prior to the giving of the notice.

The notice of abandonment, therefore, can only be sustained, if at all, because of the damages suffered. That is the clear meaning of the notice, and is, in fact, the only ground upon which the action herein was instituted. The thought of anything else as a possible basis for abandonment came afterwards; indeed, after the great bulk of the evidence had been taken. It slightly antedates Thorndyke's "recollection" of the verbal abandonment.

So far, we have only considered the written notice of abandonment, because it was, in truth, the only one ever given. But even if the verbal notice of abandonment had been given, as Thorndyke attempted to describe, it could not sustain a claim for constructive total loss. Bearing in mind that the "Nottingham" was towed in on the *15th,* and that the tugs had been sent to her on the morning of the 14th, there is no evidence that at the only time verbal abandonment could have

been made to Taylor on Saturday, to wit, after 9 o'clock at night, the "Nottingham" was not then in tow of the salving tug, and no longer abandoned and derelict. Yet the state of facts, and not the state of information, is the criterion. What the state of fact was at 9 o'clock on Saturday night, the record does not show, because at the time proof was adduced, the afterthought of the verbal abandonment had not occurred. No evidence was subsequently taken upon it by appellees. The evidence on this point, therefore, will not sustain the contention of appellees.

That the abandonment was intended, as stated in the notice, "in consequence of the damages sustained," is established by the testimony of Thorndyke, who admitted that the purpose of taking the "Nottingham" to the St. Johns drydock was to ascertain whether she was a total loss under the policies (Ap. pp. 370-1).

By whatever test, then, the contention of appellees is tried, it fails. Under the facts, the right to abandon did not exist. In point of principle the contention is not supported by the cases cited. And adjudged by the governing statutory requirements of a notice of abandonment, the right to abandon can alone be grounded upon the damages to the "'Nottingham", the cost of repairing which was not sufficient to give appellees the right under clause 9 of the policies.

High Probability Rule Inapplicable Under Policy Conditions. But if Applied, Still Constructive Total Loss Did Not Exist.

The so-called "high-probability" rule, which finds expression in a number of cases under the general Ameri-

can law, is invoked to support the abandonment. In none of these decisions, however, were policies of the form here in suit construed. But that such principle of abandonment exists under the general American law, is not to be denied, for such was the holding in *Peele v. Ins. Co.,* supra, and in *Bradlie v. Ins. Co.,* supra. The doctrine was also enunciated in

> *Orient Ins. Co. v. Adams,* 123 U. S. 67; 31 L. ed. 63,

but it will be observed, in that case, that the policy expressly provided that

> "in no case whatever shall the assured have the right to abandon until it shall be ascertained that the recovery and repairs of the said vessel are impracticable. * * *"

Thus the rule had special application there, for the practicability of the recovery and repairs was necessarily to be tested by their "high probability," as there is in "impracticability" the same principle "of wanting in certainty" as constitutes the foundation for the high probability rule.

The case of

> *Royal Exchange Assur. v. Graham & Morton Trans. Co.,* 166 Fed. 32,

is an authority in support of the application of the high probability rule to a policy, the terms of which stipulated that the right of abandonment should not exist, unless the loss exceeded one-half the value of the hull and machinery, as stated in the policy. In point of principle, the decision would seem to be applicable

to a policy such as is now before the court, stipulating, as does clause 9, that

> "the insured shall not have the right to abandon the vessel unless the amount which the company would be liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) shall exceed half the amount hereby insured."

But Mr. Justice Mathews, Circuit Justice of the Circuit Court for the Sixth Circuit, in

Wallace v. Thames & Mersey Ins. Co., 22 Fed. 66,

after a review of the general American law, held to the contrary, in passing upon a policy almost identical in terms with the policies here in suit, save that the present policies exclude salvage and general average expenses and the cost of funds. Of it, the court said:

> "A comparison with this state of the law, of the special stipulations of the policy, will show clearly the changes in the rights and obligations of the parties intended to be introduced by their contract. They are as follows:
>
> "First. *The right of abandonment is made to depend upon the result, and not upon a calculation of probabilities.* No right to abandon is admitted when the loss is not strictly and technically an actual total loss, unless, as it turns out, the expense of restoration exceeds one-half the value.
>
> "Second. The cost of repairs is to be adjusted for the purpose of determining such excess as if the loss were admitted to be partial; that is, by deducting one-third new for old. The language is that 'the assured shall not have the right to abandon the vessel in any case unless the amount which

> the insurers would be liable to pay under an adjustment as of a partial loss shall exceed half the amount insured'."

To the same effect is

Hall v. Franklin Ins. Co., 9 Pick. 466.

Thus, the question as to whether the doctrine of "high probability" is applicable to the present policies remains, we submit, without settled determination. But that condition of the law does not affect the result in the case at bar, because, even if tried by the rule, *the facts do not show a high probability of the existence of conditions which would have given appellees the right to abandon.*

If so tested, the question would have been as to whether, at the time of abandonment, there was a "high probability" that the amount which appellant would have been liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) would have exceeded half the amount insured, viz., $15,000. *The facts show that there was no "high probability" that such partial loss liability would have been in excess of $15,000, nor anywhere near that amount.*

Based upon the actual cost for which the "Nottingham" could have been repaired and restored to her former condition, the amount which appellant would have been liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds), would have amounted, as we have previously pointed out, to $9540.66, or *$5459.34 less than the*

required liability. Instead, then, of there being a "high probability", *the facts show that the liability would have been less than two-thirds of the required amount.*

But granting, for sake of argument, any concession to which claim has been made by appellees because of any doubt as to the cost of repair, still, as we have already shown, the amount which appellant would have been liable to pay under such an adjustment, as of partial loss for labor and materials, would only have been $11,037.02, *or $3962.98 less than the amount necessary to have given appellees the right to abandon.*

There was not, then, a high probability, or any probability, that the amount which appellant would have been liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds), would have exceeded half the amount insured. No one so testified for appellees; in fact, no witnesses called in the case were interrogated upon the point, as they were in *Royal Exchange Assur. v. Graham & Morton Trans. Co.,* supra. The record is barren, then, of any evidence which would lend support to a successful application of the doctrine of "high probability". Neither the original complaint, nor the amended complaint alleged such "high probability", and, indeed, was not drawn upon that theory of loss. *It did not, in fact, exist.*

In all of the circumstances of the case, therefore, we respectfully submit that the evidence does not show

the right to recover for a constructive total loss under the terms and conditions of the policies, and by them are the rights of the parties governed.

Soelberg v. Western Assur. Co., supra.

We renew the prayer of our opening brief for relief, and will ever pray, etc.

Dated, San Francisco,
December 27, 1915.

Respectfully submitted,

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